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Supreme Court, U.S.
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In The

Supreme Court of the United States

AMBASE CORPORATION,
A Delaware Corporation,

Petitioner,

v.

CITY INVESTING COMPANY LIQUIDATING TRUST, as successor to City Investing Company, a dissolved Delaware Corporation, JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, and LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner respectfully submits that the Court of Appeals for the Second Circuit erroneously decided two important issues on which the circuits are divided:

1. Did the Second Circuit err by raising and upholding, sua sponte, the affirmative defense of res judicata notwithstanding that Respondents had expressly waived the defense in the trial court, the issue was not mentioned by the parties or the court in briefing or oral argument, and Petitioner was never accorded an opportunity to address it?

2. Did the Second Circuit contradict the Full Faith and Credit Act in holding that AmBase was precluded from arguing that it satisfied New York's six-year statute of limitations because a Delaware court had held that it failed to satisfy Delaware's three-year statute of limitations?

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

CORPORATE DISCLOSURE STATEMENT

AmBase Corporation is a publicly held company that does not have a parent corporation, and no publicly held company owns 10% or more of the stock of the corporation.

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PETITION FOR A WRIT OF CERTIORARI

AmBase Corporation ("AmBase"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, as amended, is reported at 326 F.3d 63 (2d Cir. 2003), and is reprinted in the appendix hereto ("App.") at 1a. The relevant portions of the Court of Appeals unamended opinion are unpublished, and are reprinted at App. 66a. The Court of Appeals order denying rehearing and rehearing *en banc*, as modified, is reprinted at App. 57a. The unpublished decision of the district court is available at *AmBase Corp. v. City Investing Co. Liquidating Trust*, No. 01-Civ-0771, 2002 U.S. Dist. LEXIS 482 (S.D.N.Y. Jan. 11, 2002), and is reprinted at App. 25a. The decision of the Delaware Chancery Court in a related case is available at *AmBase Corp. v. City Investing Co.*, No. 18207, 2001 Del. Ch. LEXIS 16 (Feb. 7, 2001), and is reprinted at App. 38a. This written decision of the Delaware Chancery Court supplemented a prior oral ruling, which was reflected in a written order dismissing that case, which is reprinted at App. 55a.

JURISDICTION

Judgment of the Court of Appeals was entered on April 3, 2003, and modified on April 24, 2003; the Order denying rehearing and rehearing *en banc* was entered on June 12, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT CONSTITUTIONAL, STATUTORY, AND RULES PROVISIONS

This petition implicates a number of clauses of the Constitution of the United States. Section I implicates the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Section II implicates the Full Faith & Credit Clause, which requires that "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. CONST. art. IV, § 1.

Section I also implicates Federal Rules of Civil Procedure 8(c) and 12(b), which provide that:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other manner constituting an avoidance or affirmative defense.

FED. R. CIV. P. 8(c), and that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required. . . .

FED. R. CIV. P. 12(b).

Relevant to resolving the arguments raised in Section II is the Full Faith and Credit Act, which provides:

> [The] Acts, records and judicial proceedings or copies thereof [of any State, Territory, or Possession of the United States], so authenticated, shall

> have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

1. Introduction

This case raises two important questions of federal civil procedure on which the circuits are divided. The first is whether a court of appeals may itself, sua sponte, raise an *expressly waived* defense of res judicata and order the dismissal of a case without ever giving the plaintiff an opportunity to respond to that defense. The second is whether a federal court in New York should give claim-preclusive effect to a foreign state court's dismissal based on that state's statute of limitations, where it is clear that the foreign state follows the traditional rule of treating its statute of limitations as a purely procedural limit on the remedy available in that state, and not as a limit on the substantive right at issue.

While this Court has addressed both questions in *dicta* in two recent decisions, those decisions have not resolved the conflicts among the lower courts. The decision below plainly contradicts the reasoning in this Court's earlier opinions, and plainly violates basic notions of due process. This Court's review, therefore, is warranted.

The procedural context in which these two issues have arisen is remarkable. The Second Circuit affirmed the district court's dismissal of Petitioner AmBase's multi-million dollar lawsuit against Respondents solely on the

ground that its claim was barred, as res judicata, by an earlier Delaware Chancery Court decision dismissing the claim under Delaware's three-year statute of limitations. That result, although plainly wrong (see below), would in and of itself be unremarkable, were it not for the fact that res judicata is an affirmative defense which is waived if not timely raised before the trial court. Here, Respondents not only failed to raise the defense, but expressly *disclaimed* it, twice insisting in its trial court briefs that it "has never raised res judicata, or claim preclusion, as a basis for dismissal of this case." Consistent with this, Respondents never once mentioned the defense, either in their appellate briefs or at argument. Nor did the panel below ever raise the question of whether res judicata applied prior to its ruling on the issue in its opinion. Unsurprisingly, then, AmBase saw no reason to explain in the courts below why the defense of res judicata, had it been raised, was inapplicable to its case.

Instead, AmBase devoted its efforts on appeal to showing why the trial court erred in dismissing AmBase's complaint under New York's six-year statute of limitations. AmBase thus had no opportunity to alert the panel to *Arizona v. California*, 530 U.S. 392 (2000), which makes clear that an appellate court cannot "ordinarily" raise, sua sponte, the defense of res judicata once it has been waived. Emphasizing that the sua sponte application of an otherwise waived res judicata defense "erod[es] the principle of party presentation so basic to our system of adjudication," 530 U.S. at 413, the Court noted that it is appropriate for a court to do so only when it is "'on notice that *it* has previously decided the issued presented,'" *id.* at 412 (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980)) (emphasis added). Here, the Second Circuit was relying upon AmBase's dismissal by a Delaware court for

failure to satisfy Delaware's three-year limitations period, an issue that was not relevant to AmBase's New York claim. The Second Circuit's sua sponte application of res judicata thereby deepened a circuit conflict on the proper respect to be accorded the waiver rule set forth in FED. R. CIV. P. 8(c), and led the panel into its second error.

Specifically, the panel overlooked this Court's recent observation that "the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitation periods." *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001). Under this traditional rule, AmBase's dismissal by a Delaware court for failure to satisfy its *three*-year statute of limitations would clearly not have preclusive effect on AmBase's New York claim, which is subject to a *six*-year statute of limitations. Both New York and Delaware plainly apply this traditional rule. The Second Circuit, however, improperly cited to *federal* case law instead of applying *Delaware* law, as mandated by numerous decisions of this Court. It therefore misapplied the Full Faith and Credit Act by according "greater preclusive effect to a state-court judgment than the state court itself would do." *Johnson v. De Grandy*, 512 U.S. 997, 1005 (1994) (citation omitted).

For the reasons set forth below, we respectfully submit that this Court's review is warranted to resolve the confusion of authority on both questions presented.

2. Factual And Procedural Background

Petitioner AmBase, a Delaware Corporation, was formed in 1975 as a wholly owned subsidiary of City

Investing Company ("City"). In the early 1980s, to manage its self-liquidation, City formed Respondent City Investing Company Liquiding Trust ("Trust"). In 1985, City distributed various assets to its shareholders, including shares in both Petitioner AmBase and Respondent Trust. Although Petitioner AmBase was a separate entity from both City and the Trust, AmBase's officers and directors included several trustees and beneficiaries of Respondent Trust.

At the same time in 1985, Petitioner AmBase and Respondent Trust entered an Assignment Agreement, whereby AmBase accepted responsibility for the consolidated income taxes of the City consolidated group. In 1986, the IRS alleged that a foreign subsidiary of City was liable for outstanding withholding taxes. Although the allegedly deficient withholding tax was not a component of the City group's consolidated income tax, Petitioner AmBase's officers and directors, who were beneficiaries of Respondent Trust, directed AmBase to litigate the tax claim as its own. That litigation was at long last resolved when, in May 2001, the Tax Court ruled that in fact neither Respondent Trust nor Petitioner AmBase was liable for the deficiency. *AmBase Corp. v. Commissioner, IRS*, No. 11816-95, 2001 Tax Ct. Memo LEXIS 150 (May 23, 2001). While that case was pending before the Tax Court, in August 2000, Petitioner AmBase brought suit against both the Trust and several of its former officers and directors (collectively "Respondents"), in the Delaware Chancery Court. AmBase contended that Respondents, and not AmBase, remained responsible for any withholding tax liability, and for the $3.2 million expended by AmBase to defend against it. Concluding that AmBase's claim had accrued no later than December of 1996, the Chancellor found the action procedurally time-barred by Delaware's three-year statute of limitations and laches. After first ruling orally, the Chancellor's order expressly noted that

this was not a "rul[ing] on the merits of the underlying substantive claims." App. at 56a. On AmBase's motion for reconsideration, the Chancellor reiterated his decision in a written opinion. *AmBase Corp. v. City Investing Co.*, No. 18207, 2001 Del. Ch. LEXIS 16 (Feb. 7, 2001).

AmBase promptly filed this action against the same defendants in the United States District Court for the Southern District of New York. Respondents again moved to dismiss the action, this time based on New York's six-year statute of limitations. Although Respondents argued that AmBase was collaterally estopped from contesting certain facts found by the Delaware Chancellor, they never argued that the entire action was res judicata. To the contrary, they specifically disclaimed reliance on res judicata, emphasizing that they "ha[ve] never argued that res judicata bars AmBase from bringing a claim in New York because that claim was previously dismissed in Delaware on statute of limitations grounds," and also that "[t]he Trust has never raised *res judicata*, or claim preclusion, as a basis for dismissal of this case." App. at 63a, 61a. Res judicata is, of course, an affirmative defense that must be affirmatively pleaded under Federal Rule of Civil Procedure 8(c). Accordingly, given Respondents' failure, indeed refusal, to plead it, the District Court neither relied upon, nor even mentioned, the affirmative defense. Rather, the District Court dismissed AmBase's claims as time-barred under New York's six-year statute of limitations. *AmBase Corp. v. City Investing Co. Liquidating Trust*, No. 01-Civ-0771, 2002 U.S. Dist. LEXIS 482 (S.D.N.Y. Jan. 11, 2002).

AmBase appealed to the Second Circuit, where it challenged the District Court's conclusions regarding the New York statute of limitations. Respondents defended the District Court's statute of limitations ruling on its own

merits. No party raised, briefed, or in any other way argued res judicata, nor did the panel raise or allude to res judicata at oral argument. Nevertheless, on April 3, 2003, the Second Circuit issued an opinion in which it concluded that AmBase's entire cause of action was barred by operation of the Delaware Chancery decision. *AmBase Corp. v. City Investing Co. Liquidating Trust*, 326 F.3d 63 (2d Cir. 2003). The panel did so without ever informing either party that it was considering res judicata, inviting briefing, or in any other way affording the parties an opportunity to address the question. App. at 1a-24a.

AmBase immediately filed a petition for rehearing and suggestion of rehearing *en banc*. Eight days later, the Second Circuit issued an "Errata," modifying the panel's opinion by adding a single citation to a Delaware decision applying Delaware's law of res judicata. *Compare* App. at 19a, *with* App. at 68a-69a. AmBase's rehearing petition was then denied without comment. App. at 51a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER THEY HAVE PLENARY DISCRETION TO APPLY SUA SPONTE A DEFENSE OF RES JUDICATA WHICH THE DEFENDANT HAS WAIVED.

A. The Second Circuit Erred In Sua Sponte Applying The Waived Defense Of Res Judicata.

Rule 8(c) of the Federal Rules provides that res judicata is an affirmative defense that must be asserted in an appropriate responsive pleading in the trial court, or else it is forfeited. In this case, Respondents not only failed to raise, but expressly disclaimed the defense of res

judicata before the District Court, and they never asserted that defense in the appellate court proceedings. Thus, the question presented is whether the Court of Appeals erred in raising and applying that affirmative defense sua sponte. The Courts of Appeals are clearly divided on this question: the Second, Fifth, Sixth, Eighth, and Ninth Circuits have held that courts are free to act sua sponte to apply the affirmative defense of res judicata even when that defense was not raised, and was thus waived, by the defendant; by contrast, the First, Third, Fourth, Seventh, Tenth, and District of Columbia Circuits have not departed from the traditional rule under which appellate courts will not raise res judicata for the first time sua sponte on appeal. While this Court's decision in *Arizona v. California*, 530 U.S. 392, 412 (2000), indicates that courts are ordinarily not free to act sua sponte to apply res judicata after it has been waived, the decision did not resolve the forgoing circuit split. Review should therefore be granted in this case to ensure a uniform practice among the circuits as to the circumstances under which a court may itself raise res judicata notwithstanding that it has been waived by the defendant.

1. The Federal Rules are clear as to the effect of a failure to timely plead any affirmative defense, including res judicata. Rule 8(c) requires a defendant to set forth any affirmative defense it has to the complaint.[1] Rule

[1] These include accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, "and any other matter constituting an avoidance or affirmative defense." FED. R. CIV. P. 8(c).

12(b), in turn, requires a party to raise "every defense, in law or fact, to a claim for relief in any pleading . . . in the responsive pleading thereto." FED. R. CIV. P. 12(b). It is well settled that, in the ordinary operation of these two rules, an affirmative defense is waived if not timely raised. *See Arizona*, 530 U.S. at 410; *Taylor v. United States*, 485 U.S. 992, 992 (1988) (White, J., dissenting from denial of certiorari).

"The purpose of such pleading is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate." *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 350 (1971). The rule promotes both efficiency and fundamental fairness by creating an incentive for defendants to come forward quickly with dispositive defenses, rather than sitting on their rights and potentially "gaming" the system. *See, e.g., Harris v. Secretary, U.S. Dep't of Veteran Affairs*, 126 F.3d 339, 341, 343-45 (D.C. Cir. 1997) (noting that ignoring Rule 8(c) would allow defendants to "omit affirmative defenses in pleadings strategically," thus denying plaintiffs a fair chance to conduct discovery and develop legal strategies on notice of the potential procedural bar).

2. The Second Circuit's decision to revive, sua sponte, an expressly disclaimed res judicata defense is consistent with that court's prior jurisprudence, and with four other circuits that have held that courts have the power to revive waived defenses. While it had not previously addressed whether an appellate court may do so, the Second Circuit has previously endorsed the practice by district courts:

> [W]e have previously upheld a district court's dismissal of a case on collateral estoppel grounds even where collateral estoppel was not raised as an affirmative defense in the answer, but was

> raised by the district court sua sponte, without permitting the party against which it was asserted an opportunity to argue the issue.

Curry v. City of Syracuse, 316 F.3d 324, 331 (2d Cir. 2003) (citing *Doe v. Pfrommer*, 148 F.3d 73, 80 (2d Cir. 1998)).

In addition to the Second Circuit, several courts of appeals have discarded the traditional understanding of Rule 8(c). The Fifth and Eighth Circuits will sua sponte raise a waived preclusion defense for the first time on appeal whenever necessary to affirm the district court. *See Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1172 (5th Cir. 1992); *American Furniture Co. v. International Accommodations Supply*, 721 F.2d 478, 482 (5th Cir. 1981) ("[W]here all of the relevant facts are contained in the record before us and all are uncontroverted, we may not ignore their legal effect, nor may we decline to consider the application of controlling rules of law to the dispositive facts, simply because neither party has seen fit to invite our attention to the issue by technically correct and exact pleadings. We do so sua sponte.") (citing *W.E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, Inc.*, 186 F.2d 236 (2d Cir. 1951); *Wilson v. United States*, 166 F.2d 527 (8th Cir. 1948)); *Bechtold v. City of Rosemount*, 104 F.3d 1062, 1068 (8th Cir. 1997) ("Where the District Court can be affirmed on different grounds, even though not raised, this court may exercise its discretion to do so.") (citing *Zirinsky v. Sheehan*, 413 F.2d 481, 484 n.5 (8th Cir. 1969)); *accord Robertson v. Interstate Sec. Co.*, 435 F.2d 784, 787 n.4 (8th Cir. 1971).

The Ninth Circuit has a long-standing practice of sua sponte considering waived affirmative defenses so long as it "gives the parties an opportunity to be heard on that issue." *See Jones v. Vasquez*, No. 99-16049, 2000 U.S. App. LEXIS 18673, at *1-2 (9th Cir. July 27, 2000) (unpublished

op.); *accord Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993) ("'It is consistent with these principles to permit a court which has been appraised by [a party] of an earlier decision . . . to examine the res judicata effect of that prior judgment sua sponte.'") (quoting *McClain v. Apodaca*, 793 F.2d 1031, 1032-33 (9th Cir. 1986)) (alteration in original); *Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1225-26 (9th Cir. 1990) (reversing sua sponte invocation of res judicata where it was done without affording parties opportunity to submit post-trial briefs on the issue).

In *Hutcherson v. Lauderdale County*, 326 F.3d 747, 757 (6th Cir. 2003), the Sixth Circuit, noting *Arizona*, sua sponte gave preclusive effect to a state court judgment for the first time on appeal. The plaintiff had filed parallel state and federal court litigation; however, as the state judgment had not become final until after defendants had moved for judgment on the pleadings in federal court, and as defendants had put plaintiffs on notice as to the possibility of a res judicata defense by pleading duplicative litigation, the Court found "special circumstances" justifying departing from the usual Rule 8(c) bar. *Id.* In endorsing this broader departure from the Federal Rules, these courts point to a number of interests, including "the finality of decisions, conserv[ing] judicial resources, and protect[ing] litigants from multiple lawsuits." *Hutcherson*, 326 F.3d at 757 (quotations omitted); *accord Bechtold*, 104 F.3d at 1068.

3. By contrast, the First, Third, Fourth, Seventh, Tenth, and District of Columbia Circuits have not departed from the traditional rule disapproving of appellate courts applying an unasserted res judicata defense for the first time on appeal. *See infra* note 3. This conflict among the circuits is manifested in the case law, but the case law,

we submit, does not and cannot capture the depth or extent of the conflicting decisions. This is because a court of appeals will rarely (if ever) gratuitously mention in its opinion that it has refrained from considering an apparently meritorious affirmative defense that it has noticed but that was not raised at trial or on appeal. Therefore, circuit court decisions sua sponte applying an unasserted affirmative defense necessarily conflict with innumerable instances in which a court of appeals has refrained from resurrecting and considering even an apparently meritorious but unasserted defense, and (naturally) did not state in its opinion that it was refraining from doing so.

In any event, the circuit split has been expressly recognized. In a case in which neither party appears to have raised the question of whether the waived defense of res judicata might apply, the Seventh Circuit held as follows:

> There is a split of authority whether [the defense of res judicata] may be raised by the court sua sponte or whether failure to preserve it on appeal precludes its applicability. The better rule seems to be that res judicata must be properly preserved on appeal.

Savings & Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038, 1039 n.3 (7th Cir. 1983).[2] Likewise,

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[2] Based on its decision in *Savings & Profit*, the position of the Seventh Circuit on this controversy would appear to be well-established. *See also Crowder v. Lash*, 687 F.2d 996, 1007-08 (7th Cir. 1982) ("Defendants, however, did not properly raise their res judicata defense in the lower court. As an affirmative defense under FED. R. CIV. P. 8(c), res judicata must be properly raised or it is waived."). However, in a recent unpublished opinion, relying on *Arizona*, the Seventh Circuit stated otherwise. "[A]lthough [the plaintiff] is right that ordinarily we will not consider an unpreserved

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one other opinion has recognized that "[t]he circuits are split on the question whether an appellate court may, for the first time, raise the issue [of claim preclusion] sua sponte." *Nixon v. United States*, 978 F.2d 1269, 1297 (D.C. Cir. 1992) (Henderson, J. concurring) (citing cases); *see also* 18 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE (JURISDICTION) § 4405, at 33-35 & nn.4&7 (1998) ("[M]any cases reaffirm the basic rule that both claim preclusion and issue preclusion are affirmative defenses that must be pleaded, and that are waived if omitted. . . . It follows from this general rule that preclusion cannot be raised for the first time on appeal." Nevertheless, "a few have raised the question of preclusion on their own motion, and it has even been raised by appellate courts for the first time on appeal.").

Beyond the split over whether a court of appeals may, without any instigation or briefing from the parties, raise and apply a waived defense of res judicata, the Second Circuit's decision also highlights the division of authority over whether a court of appeals may properly deviate from the strictures of Rule 8(c) even *if* a party asks it to do so. Allowing a party to resurrect its waived defense, of course, is not as radical a departure from normal practice as having the court do so sua sponte, without allowing any briefing or argument on the issue. Nevertheless, a majority of circuits

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ground for affirming, such as res judicata, we do have discretion to consider the argument – for example where the proper resolution is beyond doubt. Indeed we may consider the question solely of our own initiative, if it is plain from the complaint and other papers on file that res judicata renders the case frivolous." *Walker v. Page*, No. 00-3990, 2003 U.S. App. LEXIS 4412, at *10-11 (7th Cir. Mar. 11, 2003) (unpublished op.) (internal citations omitted).

have expressly rejected the argument that Rule 8(c) can be abrogated upon the defendant's request.[3]

4. In *Arizona v. California*, 530 U.S. 392, 412 (2000), this Court briefly discussed, in *dicta*, the appropriateness of a court raising a waived res judicata argument sua sponte. In doing so, it did not address the disagreement among the circuits outlined above, nor did it seek to resolve that disagreement. Instead, it simply refused to apply claim preclusion where the parties seeking to invoke it had failed to raise it earlier in the litigation, recognizing that the principles of preclusion, including Rule 8(c), "rank res judicata an affirmative defense ordinarily lost if not timely raised." *Id.* at 410. Having dispatched of the waived argument in this fashion, the Court went on to reject the suggestion that it could raise the preclusion argument sua

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[3] *See Badway v. United States*, 367 F.2d 22, 25 (1st Cir. 1966) ("Even if these [res judicata and statute of limitations] defenses had merit the defendant is not entitled to the benefit of either of them now. Under Rule 8(c) [they] must be set forth affirmatively in the pleadings."); *Kane v. Heckler*, 776 F.2d 1130, 1131-32 (3d Cir. 1985) ("Res judicata is an affirmative defense, and such a defense may not be presented on appeal if not pleaded in the district court.") (internal citations omitted); *Dellums v. Powell*, 566 F.2d 167, 178 n.13 (D.C. Cir. 1977); *Crowe v. Cherokee Wonderland, Inc.*, 379 F.2d 51, 54 (4th Cir. 1967) ("the defense of res judicata, not having been raised affirmatively below, has been waived" and cannot be raised for the first time on appeal); *Schramm v. Oakes*, 352 F.2d 143, 150 (10th Cir. 1965) ("The defenses of res judicata and collateral estoppel are affirmative defenses, must be raised as such on the trial level and cannot be raised for the first time upon appeal."); *accord Stearn v. Department of the Navy*, 280 F.3d 1376, 1380 (Fed. Cir. 2002) (limiting district court's ability to sua sponte revive waived affirmative defense); *Esslinger v. Davis*, 44 F.3d 1515, 1524 (11th Cir. 1995) (same, noting that in all non-habeas cases, "we would not hesitate to condemn as a gross abuse of discretion, if not clear error, the trial court's sua sponte interposition of an affirmative defense that the defendant did not plead").

sponte. *Id.* at 395. In *dicta*, it suggested that "[j]udicial initiative of this sort might be appropriate in special circumstances," but then identified only one such "special circumstance," which relates solely to the ability of a trial court to control and husband its own resources by refusing to permit relitigation of claims that were previously adjudicated by that very court:

> [I]f a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte, even though the defense has not been raised. This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.

Id. at 412 (quoting *United States v. Sioux Nation*, 448 U.S. 371 (1980) (Rehnquist, J., dissenting) (citations omitted)). In *Arizona* itself, the preclusion argument was based upon prior decisions of this Court sitting in original jurisdiction over the longstanding water rights dispute at issue there; nevertheless, the Court refused to apply res judicata once it had been waived because "this Court plainly has not 'previously decided the *issue* presented.'" *Id.* It also noted that even under the special circumstances alluded to in the forgoing passage, a court's authority to act sua sponte remains limited by the strictures of due process. "Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar sua sponte, thereby eroding the principle of party presentation so basic to our system of adjudication." *Id.* at 412-13.

5. This Court's *dicta* in *Arizona* did not purport to resolve, and did not in fact resolve the split among the circuits on when if ever it is appropriate for a court of appeals to sua

sponte raise and apply the waived defense of res judicata. For example, the Second Circuit's decision to apply res judicata sua sponte in this case obviously cannot be justified by the "special circumstances" outlined in *Arizona*. Neither the Second Circuit nor the Southern District of New York was "on notice that *it* [had] previously decided the issue presented." *Arizona*, 530 U.S. at 412 (quotation and citation omitted) (emphasis added); *cf. Stearn v. Department of the Navy*, 280 F.3d 1376, 1380 (Fed. Cir. 2002) (concluding that in light of *Arizona*, where the legal issue raised in the subsequent action was not present in the purportedly preclusive action, "special circumstances" for waiving Rule 8(c) are not present). To the contrary, the Second Circuit's decision gave preclusive effect to a foreign state court judgment, which had dismissed AmBase's suit on an issue (Delaware's three-year statute of limitations) that was itself irrelevant to AmBase's New York lawsuit. Ignoring Respondents' own explicit rejection of the affirmative defense, the Second Circuit made no effort to identify a single "special circumstance" justifying departure from the usual waiver rule, nor did it cite this Court's opinion in *Arizona*. It did not mention Rule 8(c), nor did it even acknowledge that it was acting sua sponte. It simply applied the waived defense, without even providing AmBase with notice of the issue, let alone an opportunity to address it prior to the court's rendering its decision. App. at 1a-24a.

6. This Court should review the Second Circuit's opinion in this case to resolve this conflict in the circuits, and to rule that federal appellate courts do not have the power to revive the waived defense of res judicata absent the narrow and identified special circumstances referenced in *Arizona*. This issue arises in innumerable contexts throughout the federal system, and the absence of a uniform rule has lead to and will continue to yield conflicting

results that will encourage forum shopping. Moreover, if the Second Circuit's decision is allowed to stand, then the Rule 8(c) waiver will be eviscerated: any party that has waived its defense will nonetheless argue that the circuit court should revive the defense "sua sponte." Finally, as the Second Circuit's decision here demonstrates (*see infra*, Section III), by raising and resolving an unasserted affirmative defense sua sponte, an appellate court abandons the principle of "party presentation," the bedrock to our judicial system, *Arizona*, 530 U.S. at 413, and in so doing unnecessarily risks uninformed and erroneous decisionmaking.

B. The Second Circuit Violated AmBase's Due Process Rights By Failing To Give AmBase Notice And Opportunity To Respond To The Waived Defense Of Res Judicata.

As this Court has repeatedly and consistently held, "there can be no doubt that at a minimum [due process] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Both the Fifth and Fourteenth Amendments guarantee the right to be heard, "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In line with these bedrock principles, the constitutional right to a hearing must limit the ability of an appellate court to rule against an appellant based upon a defense that was waived in the District Court, never briefed on appeal, and never mentioned by the appellee or the court during oral argument. To be sure, the Due

Process Clause may not be implicated simply because an appellate court rules sua sponte against a litigant on a ground that was not briefed and that did not come up at argument. But this case is far more egregious than that: under the Federal Rules and this Court's precedents, Respondents not only had failed to affirmatively plead the affirmative defense of res judicata, it affirmatively renounced the defense. The traditional application of Rule 8(c) denies plaintiff an affirmative defense even when it is merely forfeited by non-pleading; here it was affirmatively waived. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

AmBase therefore had every right to expect the Second Circuit to apply the normal waiver rule. The law must "give[] people confidence about the legal consequences of their actions," and courts, no more than legislatures, should not lightly "sweep away settled expectations suddenly and without individualized consideration." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-67 (1994). *See also Harris*, 126 F.3d at 343-45 (detailing prejudice to defendants by failure to enforce notice requirement of Rule 8(c)). At a minimum, AmBase had a right to expect to be given an opportunity to address the issue if the Court decided to raise it sua sponte.[4] The Second Circuit nullified

[4] Nearly every other court to touch upon the issue has at the very least required notice and an opportunity to be heard. *See, e.g., Dempsey v. Sears Roebuck & Co.*, No. 91-2167, 1992 U.S. App. LEXIS 20672, at *5 (1st Cir. June 5, 1992) ("Any potential surprise from a sua sponte dismissal due to an unanticipated defense can be avoided by first

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these reasonable expectations through a judicial broadside: ruling against AmBase on an issue that was expressly waived by the defendant in the trial court and never mentioned on appeal, without ever giving AmBase an opportunity to explain why that defense had no merit in any event.[5]

This Court recognized in *Arizona* that dismissing sua sponte an action on a theory that was not raised by the defendant not only violates Rule 8(c), it runs contrary to the basic procedural norms of our system. "Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar sua sponte, thereby eroding the principle of party presentation so basic to our system of adjudication." 530 U.S. at 412-13. This is particularly so at the appellate level, where a litigant's only real recourse is appeal to this Court's discretionary jurisdiction.

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allowing the defendant to be served and given an opportunity to brief the issue or otherwise complete the record."); *Russell*, 962 F.2d at 1172 (allowing affirmative defense to be raised on appeal, but requesting supplemental briefing on the defense); *Stonelight Tile, Inc. v. Bay Area Air Quality Mgmt. Dist.*, Nos. 99-16381 & 99-17037, 2001 U.S. App. LEXIS 920 (9th Cir. Jan. 18, 2001) (reversing district court for sua sponte dismissal on statute of limitations without first giving the parties an opportunity to brief and address the issue).

[5] To be sure, AmBase was able to raise this point in its petition for rehearing. But surely appellate courts cannot invoke and apply waived defenses in resolving cases and require the losing party to come back to the court on petition for rehearing, with a heavy presumption against it, to plead against those grounds. The appellate courts simply cannot devote the same resources to petitions for rehearing as they must to appeals in the first instance, and it would be fundamentally unfair to allow those primary decisions to be made on bases never addressed by the parties.

This Court recognized the very same difficulty in *Burns v. United States*, 501 U.S. 129 (1991), where it was invited to interpret Federal Rule of Criminal Procedure 32. There, the trial court had, without notice, departed upwards from the parties' agreed-upon sentencing recommendation. "In this case, were we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (the Court will construe statutes so as to avoid raising serious constitutional questions)).[6]

In short, dismissing a case at the appellate level on an issue affirmatively waived in the trial court and never addressed by the parties cannot be squared with the Fifth Amendment's minimum requirement of notice and opportunity to be heard. This Court's review is warranted to establish this vital principle.[7]

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[6] Similarly analogous is *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209-10 (1958), wherein the Court recognized that it would violate the due process clause to dismiss a cause of action for failure to comply with a court order, where the means of complying lie beyond the party's control.

[7] This Court's review by writ of certiorari in addition to being appropriate to resolve circuit splits, is also permissible where the court of appeals has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a). By ruling sua sponte, without inviting either briefing or argument on an issue that Respondents had in fact expressly disavowed, the Second Circuit departed wholesale from the ordinarily adversarial process, and in doing so trenched upon AmBase's reasonable expectations to a modicum of procedural due process. Resort

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II. THE SECOND CIRCUIT'S RES JUDICATA ANALYSIS MISAPPLIED THE FULL FAITH AND CREDIT ACT.

Just two years ago, this Court unanimously held that "the traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitation periods." *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001). Delaware clearly follows this traditional rule.[8] While purporting to follow Delaware law, however, the Second Circuit flatly contradicted this traditional rule. It did so not by misinterpreting Delaware law, per se, but by failing to recognize that federal law, in the form of the Full Faith and Credit Act ("FFCA"), 28 U.S.C. § 1738, required it to undertake a specific inquiry which it failed to make: instead of merely asking whether a statute of limitations dismissal is thought to be "on the merits" (which was the inquiry undertaken in the decisions which *Semtek* overruled), the Second Circuit should have inquired into whether Delaware's statute of limitations is merely a "procedural" limit on the remedy available in that state, or is instead a "substantive" qualification of the right itself.

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to this Court's supervisory authority is particularly appropriate as to the due process issue, because in this instance even developing a disagreement among the circuits is unlikely: because the due process violation occurs only in the circuit's own sua sponte ruling, only rarely if ever would the circuit panel even address the issue.

[8] *See generally Tiffany v. O'Toole Realty Co.*, 153 A.2d 195, 199-200 (Del. Super. Ct. 1959); *Equity Corp. v. Groves*, 53 A.2d 505 (Del. Ct. 1947); *Cappello v. Patrician Towers, Inc.*, No. 102, 1981 Del. LEXIS 272, at *2-3 (Del. Jan. 14, 1981).

The FFCA requires "a federal court [to] give a ... state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). By the same token, the FFCA prevents "a federal court [from] accord[ing] greater preclusive effect to a state court judgment than the state courts themselves would give to it." *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985) (Burger, C.J., concurring) (*citing Migra*).[9] Of course, state courts will not often, if ever, have cause to address whether a dismissal in one of their *own* courts for failure to satisfy their *own* statute of limitations precludes the plaintiff from bringing a similar action in the courts of *another* state, in which a longer statute of limitations will apply. For this reason, when federal courts have sought to apply a state's res judicata law to determine the preclusive effect of that state's judgment, they have resorted to one of two distinct inquires: Some courts, like the Second Circuit in this case, have undertaken a rather superficial inquiry into whether that state considers

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[9] As this Court has made clear, "[t]he preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute . . . ." *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). Accordingly, it is well-established that this Court has ultimate authority to correct any federal court's erroneous decision to dismiss a case as barred by the res judicata effect of a prior state court dismissal. *See generally id.* (reversing Seventh Circuit's decision that earlier state court dismissal barred federal antitrust claim); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984) (vacating Sixth Circuit decision holding that employee's federal claim was barred by prior state court dismissal).

a statute of limitations dismissal to be "on the merits."[10] While that inquiry might have sufficed under what this Court described as "the original connotation of an 'on the merits' adjudication," *Semtek*, 531 U.S. at 501, it cannot suffice as a proper inquiry under the FFCA today, because, as this Court held in *Semtek*, "it is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect." *Id.* at 503. Other courts, by contrast, have undertaken a deeper inquiry into whether the statute of limitations of the state in which judgment was entered was intended to be a substantive limit on the cause of action that was alleged, or was instead intended to be merely a procedural limit on the remedies available for violation of that right in that state.[11]

The correctness of this latter inquiry is confirmed by this Court's jurisprudence: traditionally, states "did not regard statutes of limitations as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts." *Sun Oil Co. v.*

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[10] *See, e.g., EFCO Corp. v. U.W. Marx, Inc.*, 124 F.3d 394 (2d Cir. 1997); *Austin v. Super Valu Stores*, 31 F.3d 615 (8th Cir. 1994); *see also Marinkovic v. Casey, Gerry, Casey, Westbrook, Reed*, No. 96-56657, 1998 U.S. App. LEXIS 2043 (9th Cir. Feb. 10, 1998).

[11] *See generally Reinke v. Boden*, 45 F.3d 166 (7th Cir. 1995); *Rose v. Town of Harwich*, 778 F.2d 77 (1st Cir. 1985); 18 MOORE'S FEDERAL PRACTICE § 131.30[g] (2003) ("If the statute is considered substantive under state law (and is said to extinguish the right), then a prior judgment on the statute must be given claim-preclusive effect in a subsequent action in federal court, but if the state classifies the statute as procedural (and therefore only affects the remedy), then the federal court must follow the state's preclusion law and deny the state court judgment preclusive effect."); *see also id.* at nn.100-02 (citing cases undertaking inquiry into whether statute of limitations was substantive or procedural).

Wortman, 486 U.S. 717, 725 (1988). Under this traditional view, "the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld." *Id.* As this Court stated in *Semtek*, this "traditional rule" means "that dismissal on [statute of limitations] ground[s] does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitation periods." *Semtek*, 531 U.S. at 504.

In light of this traditional rule, we submit that the better view among the divided circuits[12] is that a federal court can conclude that a state court's statute of limitations dismissal is res judicata only by first concluding that the limitation rule in question is *not* a purely procedural limit on the remedy available in that state, but is instead intended to be a constraint on the substantive right in question.[13] For example, in *Reinke v. Boden*, 45 F.3d 166 (7th Cir. 1995), the Seventh Circuit addressed whether a Minnesota court's dismissal of a complaint as time-barred precluded a subsequent diversity case in Illinois federal

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[12] *Compare supra* n.10 with n.11.

[13] This conclusion must be reached as a matter of federal law, because a failure to inquire into whether the state's limitations period is substantive or procedural necessarily risks committing one of two fatal errors in applying the FFCA: (1) if the statute of limitations is a procedural limit on the remedy available in that state's jurisdiction, then a decision by the federal court giving the earlier dismissal res judicata effect would "accord greater preclusive effect to [the] state court judgment than the state courts themselves would give to it," *Marrese*, 470 U.S. at 387; (2) by contrast, in the comparatively rare case where the statute of limitations is a limit on the substantive right at issue, then a decision by the federal court not to dismiss on res judicata grounds would fail to "give [the] state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra*, 465 U.S. at 81.

court. To resolve "the difficult question of the correct characterization of the Minnesota judgment," it first recognized that "[s]tatutes of limitations have traditionally been characterized as falling into one of two categories": those which are "an integral part of the cause of action; when the statute of limitations runs, the cause of action is extinguished," and "[t]he second and more common type of statute of limitations [which] does not extinguish the cause of action upon the running of the limitations period; only the possibility of obtaining a remedy in the forum is gone." *Id.* at 169. In language strikingly similar to this Court's statement in *Semtek*, the Seventh Circuit explained that res judicata does not attach to dismissals based upon violations of this latter, "more common" type of limitations rule:

> [U]nder this traditional approach, a dismissal under this form of statute of limitations does not bar a subsequent suit in another jurisdiction. It simply means that the cause of action cannot be heard in the jurisdiction of dismissal because that jurisdiction considers suits of that vintage to be stale. That judgment establishes only that the suit is time-barred in the state of rendition; it says nothing about a suit in the second jurisdiction.

Id.

Thus, before looking into the nature of the Minnesota statute of limitations at issue in *Reinke*, the Seventh Circuit set forth the basic proposition that there is a fundamental distinction between "traditional" and "substantive" limitation rules in resolving "the command of

§ 1738." *Id.* Other circuit court decisions,[14] as well as decisions of state courts of last resort[15] likewise recognize that in resolving the preclusive effect of a prior state court dismissal on statute of limitations grounds, "the crucial question is whether the rendering state considers the particular statute of limitations to be substantive or procedural." 18 MOORE'S FEDERAL PRACTICE § 131.30[g].

The Second Circuit decision in this case failed to ask this "crucial question," and thereby violated the FFCA because it gave the Delaware court's dismissal "greater preclusive effect" than would the Delaware courts. *See Marrese*, 470 U.S. at 387. It is well established "that Delaware statutes of limitations are generally regarded as procedural." *Tiffany v. O'Toole Realty Co.*, 153 A.2d 195, 199-200 (Del. Super. Ct. 1959); *see also Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984). For that reason, in Delaware it likewise is "well established that a judgment based on the forum's statute of limitations is not a ruling on the merits and is not, therefore, entitled to res judicata effect in a later action in another jurisdiction." *Cappello v. Patrician Towers, Inc.*, No. 102, 1981 Del. LEXIS 272, at *2-3 (Del. Jan. 14, 1981); *see also Equity Corp. v. Groves*, 53 A.2d 505 (Del. Ch. 1947).

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[14] *See generally Rose v. Town of Harwich*, 778 F.2d 77, 80 (1985) (distinguishing cases that "rest upon the traditional distinction between 'right' and 'remedy' and the traditional assertion that a 'procedural' statute of limitations extinguishes only the 'remedy' not the 'right' "); *Clenson v. Columbus Bank & Trust*, 651 F.2d 320, 324 (5th Cir. 1981) (statute of limitations dismissal "signifie[d] only that [the state's] courts may not be used to litigate an otherwise actionable . . . claim").

[15] *Brand v. Brand*, 116 Ky. 785 (1903); *Weinburg v. Johns-Manville Sales Corp.*, 473 A.2d 22 (Md. 1984); RESTATEMENT OF JUDGMENTS § 49, cmt. a (1942).

The Second Circuit's fundamental error is further demonstrated by the case law on which it relied in concluding that "[t]he dismissal of the Delaware Action was adverse to AmBase and was a dismissal on the merits." App. at 19a. Quite apart from the fact that the Chancellor himself recognized that his dismissal of AmBase for failure to satisfy the statute of limitations was *not* "on the merits," App. at 55a-56a, all three of the cases cited by the panel addressed the preclusive effect of a prior dismissal by a court *in the same jurisdiction* as that in which the pending action was brought. App. at 19a, 68a-69a (citing *Loving v. Pirelli Cable Corp.*, 11 F. Supp. 2d 480 (D. Del. 1998) (prior dismissal by same District Court was preclusive), *aff'd without op.*, 178 F.3d 1279 (3d Cir. 1999); *Williamson v. Columbia Gas & Elec. Corp.*, 91 F. Supp. 874 (D. Del.) (same), *aff'd*, 186 F.2d 464 (3d Cir. 1950); *Townsend v. Chasanov*, No. 129, 1995 Del. LEXIS 367 (Del. Oct. 11, 1995) (prior dismissal by Delaware Justice of the Peace Court was preclusive on subsequent case brought in Delaware Superior Court)).[16] These cases do not address the question of whether Delaware's statute of limitations is considered to be merely a procedural limit on remedies in Delaware, or is instead intended to be a substantive limit on Delaware causes of action, and they therefore cannot be relevant to the question the FFCA required the Second Circuit to answer. And two of the three decisions were *federal* cases applying solely the *federal* law of res judicata. *See Loving*, 11 F. Supp. 2d 480 (D. Del. 1998);

[16] The Second Circuit by an Errata to its original opinion, added its citation to the Delaware case only after AmBase filed its petition for rehearing.

Williamson, 91 F. Supp. 874 (D. Del. 1950).[17] Since these federal cases have nothing at all to do with Delaware's law of res judicata, the Second Circuit's reliance upon them contradicted prior decisions of this Court,[18] as well as the plain dictates of the FFCA. Worse still, the Second Circuit relied upon *Loving* even though this Court's decision in *Semtek* essentially overturned it: contrary to the analysis set forth in *Loving*, this Court held in *Semtek* that Rule 41(b) does not control the inquiry of whether a decision is "on the merits" for purposes of applying res judicata.[19]

In sum, the panel's decision, like the case law that has now been overturned by *Semtek*, failed to undertake the

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[17] Both cases involved federal courts adjudicating federal questions, in which they considered the res judicata effect of prior federal courts adjudicating federal questions; in such a context, it is well established that solely federal law principles of res judicata are applicable. *See generally Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938); *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273 (1906); 18 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE (JURISDICTION) § 4466 ("federal courts must establish their own rules to prescribe the res judicata effects of their own federal question judgments in later litigation that again presents a federal question to a federal court").

[18] *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90 (1980); *Migra*, 465 U.S. at 81; *Marrese*, 470 U.S. at 380.

[19] In relying on doubtful federal caselaw applying federal preclusion law, the Second Circuit has created a situation whereby a litigant in AmBase's shoes in the future will obtain different treatment in New York state court than in New York federal court. In New York state court, "[a] dismissal on statute of limitations grounds by another state would not, by itself, bar the bringing of an action in [that court] on res judicata grounds." *See SafeCard Servs., Inc. v. American Express Travel Related Servs. Co.*, 203 A.D.2d 65, 66 (N.Y. App. Div. 1994). This is no longer true in the New York federal courts. By creating such an opportunity for forum shopping, the Second Circuit has also blatantly contravened *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny.

essential inquiry into whether Delaware considers its statute of limitations to be procedural or substantive. While we acknowledge that the Second Circuit's plain error on this issue might not, in and of itself, warrant this Court's review, it serves to underscore the potential consequence of appellate abrogation of the waiver rules of Rule 8(c) through sua sponte decision-making. And because the Second Circuit's error was committed in conjunction with its erroneous decision to sua sponte raise and apply the expressly disclaimed defense of res judicata, we respectfully submit that this question likewise warrants this Court's review.

CONCLUSION

For the forgoing reasons, petitioners respectfully request that the petition for a writ of certiorari be granted.

September 10, 2003

Respectfully submitted,

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AMBASE CORPORATION, A Delaware Corporation, Plaintiff-Appellant, -v.- CITY INVESTING COMPANY LIQUIDATING TRUST, as successor to City Investing Company, a dissolved Delaware Corporation, JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, and MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust, Defendants-Appellees.
Docket No. 02-7230

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

326 F.3d 63; 2003 U.S. App. LEXIS 6366

November 7, 2002, Argued
April 3, 2003, Decided

As Amended April 24, 2003

COUNSEL: MARK R. KRAVITZ, Wiggin & Dana LLP, New Haven, CT (Victor A. Bolden, Wiggin & Dana, LLP, New Haven, CT, Philip Halpern, Collier, Halpern, Newberg, Nolletti & Bock, LLP, White Plains, NY, on the briefs), for Plaintiff-Appellant.

PAUL M. DODYK, Cravath, Swaine & Moore, New York, NY, for Defendants-Appellees.

JUDGES: Before: WALKER, Chief Judge, and OAKES and MINER, Circuit Judges.

OPINION BY: MINER MINER

OPINION:

MINER, Circuit Judge:

This is an appeal from a final judgment entered in the United States District Court for the Southern District of New York (Stanton, J.), dismissing on the pleadings a diversity action brought by plaintiff-appellant AmBase Corporation ("AmBase") against defendants-appellees for indemnification of legal expenses incurred in a tax dispute with the Internal Revenue Service ("IRS"). This dispute concerned certain tax liabilities that allegedly were assumed by the predecessor corporation of defendant-appellee City Investing Company Liquidating Trust (the "Trust"). The District Court dismissed the complaint upon a finding that the express contractual indemnification claim pleaded therein failed to state a claim upon which relief could be granted and that the restitution, unjust enrichment, implied contract, and breach of fiduciary duty claims were time barred by New York's statute of limitations. The District Court further denied AmBase leave to amend its complaint because the breach of contract and breach of third-party beneficiary contract claims AmBase sought to add in its amended complaint were also time barred.

This is AmBase's second bite at the litigation apple, its first bite having been taken in an action filed in the Delaware Chancery Court, *see AmBase Corp. v. City Inv. Co. Liquidating Trust,* CA No. 18207-NC (Del. Ch.) ("Delaware Action"), which was dismissed as time barred by Delaware's shorter statute of limitations. For the reasons that follow, we conclude that AmBase's claims are barred as a matter of law by the doctrine of res judicata. Accordingly, we affirm the judgment of the District Court without reaching the merits of whether AmBase's various claims either fail to state a claim upon which relief can be granted or are time barred.

BACKGROUND

I. The Parties

City Investing Company ("City") was a publicly-held Delaware holding company that was dissolved and liquidated in 1985. Before its dissolution and liquidation, City was the holding company for a multinational conglomerate with subsidiaries in the manufacturing, housing, and insurance industries. *AmBase Corp. v. Comm'r,* 2001 Tax Ct. Memo LEXIS 150, 81 T.C.M. (CCH) 1657, 1657, 2001 T.C. Memo 122 (2001). One of City's wholly-owned subsidiaries was the Home Group, Inc., which changed its name to AmBase in 1989.[1] AmBase owned several operating subsidiaries, including the Home Insurance Company, and in the mid 1980s held assets in excess of $5 billion. *AmBase,* 81 T.C.M. (CCH) at 1658.

In 1985, as part of its dissolution and liquidation, City consummated a transaction pursuant to which it distributed out its assets and liabilities. The relevant detail of this transaction was that City distributed the outstanding shares of AmBase to City's common stockholders. At the same time, the Trust was formed to, "among other things, assume all of the claims, liabilities, and obligations" of City that were "not otherwise provided for." The Trust was initially funded with assets having an aggregate estimated value of approximately $200 million. City's shareholders were the beneficiaries of the Trust and received ownership units in it. Between 1985 and 1990, the Trust distributed over $280 million in cash and assets to the former stockholders of City.

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[1] For the sake of simplicity, we refer to this entity as "AmBase."

Certain directors and officers of City ("Trustee Defendants") occupied certain fiduciary positions with both AmBase and the Trust. Defendant-appellee George Scharffenberger[2] was a Trustee of the Trust since its creation and served as Chairman of the Board of Directors of AmBase from prior to 1985 until January 1993, and as AmBase's Chief Executive Officer from March 1990 until May 1991. Defendant-appellee Eben Pyne has been a Trustee of the Trust since its creation and was a member of the AmBase Board from prior to 1985 until January 1993. And defendant-appellee Lester Mantell has served as a Trustee of the Trust since its creation, had been a senior City officer before the AmBase spin-off, and served in several officer positions (including Treasurer and Chief Financial Officer) at AmBase from prior to 1985 until December 1996. While at AmBase, Mantell (a tax attorney) had significant responsibility for AmBase's tax matters.

II. The Assignment of Certain Liabilities From City to AmBase

Pursuant to an August 1985 Assignment Agreement, AmBase assumed certain liabilities of City in consideration for City's payment of $178,767,000 and the unwinding of certain debits and credits relating to intercorporate transactions. Among those liabilities were City's obligations for federal income taxes as the common parent of

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[2] Scharffenberger died after the notice of appeal in this case was filed. By Order dated May 13, 2002, this Court substituted John J. Quirk as a Trustee and Marion Scharffenberger, executrix of the Estate of George Sharffenberger, as defendants.

City's corporate affiliates. In addition, AmBase assumed certain other liabilities and obligations of City, provided that AmBase would be only secondarily liable for the payment of those liabilities.

Shortly after the Assignment Agreement was executed, City and the Trustees entered into a Trust Agreement. AmBase was not a party to the Trust Agreement. Among other things, the Trust Agreement provided that the Trustees were to "assume all the claims, liabilities, and obligations (including unascertained or contingent liabilities in expenses) of [City]" listed on Schedule I of the Trust Agreement. Schedule I listed among the liabilities assumed "any cost, expense or liability associated with any claim asserted against City with respect to any act or omission attributable to its operations or affairs which has not been discharged in full or adequately provided for." In addition, Schedule I included, as a liability of the Trust, the costs and liabilities incurred in the defense of any litigation arising after September 25, 1985, in which City Investing was a defendant. Tax liabilities were not expressly mentioned in Schedule I.

III. Tax Dispute

During the latter half of the 1970s, City sought access to the Eurobond market to obtain long-term financing at a fixed rate of interest and to reduce the amount of indebtedness it had borrowed from its American bankers under a revolving credit agreement. *AmBase,* 81 T.C.M. (CCH) at 1658. At this time, "the practice in the Eurobond market was for issuers of securities to provide indemnification for

withholding taxes to foreign investors." *Id.*[3] Without such indemnification, "foreign investors would not have purchased Eurobond obligations . . . because the imposition of withholding taxes would decrease their [rate of] return on the Eurobond obligations." *Id.*

During this time, American companies looking to raise money in the Eurobond market often formed a wholly-owned subsidiary in the Netherlands Antilles, which would issue debt securities in the Eurobond market that were guaranteed by the American parent corporation. *Id.* The Netherlands Antilles subsidiary would then lend the Eurobond offering proceeds to the U.S. parent or one its affiliates. *Id.* In certain circumstances, the American parent company's payment of interest on its indebtedness to the Netherlands Antilles subsidiary would be exempt from American withholding taxes "by reason of the application of the U.S.-Netherlands Income Tax Convention, as extended by protocol to the Netherlands Antilles." *Id.*

In 1974, City formed a wholly-owned subsidiary in the Netherlands Antilles. In 1977 and 1979, City raised $30 million and $50 million, respectively, from the Eurobond market through its Netherlands Antilles subsidiary. *Id.* at 1659. "The payment of principal and interest on these

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[3] Sections 871(a)(1) and 881(a)(1) of the Internal Revenue Code (the "Code") "generally impose a tax of 30 percent on amounts received as interest from sources within the United States by nonresident alien individuals and foreign corporations." *AmBase,* 81 T.C.M. (CCH) at 1661. "Payers of such interest are generally required under sections 1441 and 1442 [of the Code] to deduct and withhold therefrom an amount equal to the tax imposed by sections 871 and 881 [of the Code], and in the event that they fail do so so they are liable for those withholding taxes under section 1461 [of the Code]." *Id.*

notes was unconditionally guaranteed by City." *Id.* Furthermore, the notes provided that the issuer would indemnify the holders with respect to any American withholding taxes that might be imposed. *Id.* City's Netherlands Antilles subsidiary immediately lent the proceeds from the Eurobond offering to City. *Id.* In May 1984, the 1977 notes were repaid in full. *Id.* at 1661. In September 1985, City liquidated and dissolved its Netherlands Antilles subsidiary, and the remaining debt on the 1979 notes was "upstreamed" to City. *Id.*

In or about March 1986, the IRS issued a Revenue Agent's Report to City contending that City had failed properly to withhold taxes during tax years 1979 and 1980 for the interest payments it made to the foreign holders of the Eurobonds. The IRS claimed that this subsidiary did not meet the requirements for exemption from United States withholding taxes.[4] The IRS later extended that claim to the period covering tax years 1981 through 1985. The amount of the withholding at issue was almost $21 million. As of March 1986, the accrued interest on that sum was about $10 million.

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[4] In 1984, Congress prospectively "repealed the 30-percent withholding tax imposed by Sections 871 and 881 [of the Code] with respect to certain interest paid on portfolio debt, referred to as 'portfolio interest'." *AmBase,* 81 T.C.M. (CCH) at 1661. For preexisting obligations, such as those of City, "special transitional relief [was provided] from withholding taxes applicable to interest payments" for corporations that "met requirements based on the 'principles' of certain previously revoked [IRS] revenue rulings. . . . " *Id.* Essentially, the IRS alleged that City had not met the requirements for transitional relief that would have exempted it from the obligation to pay withholding taxes.

In 1986, AmBase did not pay the taxes alleged to have been owed.[5] Moreover, AmBase did not demand that the Trust pay the taxes allegedly owing, nor did it demand that the Trust assume the defense against the IRS. On or about May 11, 1995, the IRS issued a Notice of Deficiency to AmBase, claiming entitlement to the funds that it alleged should have been withheld.

On or about June 29, 1995, AmBase filed a petition with the United States Tax Court on behalf of City contesting the alleged tax liability. By 1995, the accrued interest on the withholding obligation of $21 million had risen to $61 million for a total liability of over $80 million. AmBase did not seek to bring the Trust into the case or to sue the Trust. A little over three-and-a-half years then passed, during which time AmBase did not claim that the Trust was primarily responsible for the withholding taxes.

IV. Delaware Action

On August 14, 2000, AmBase filed a two-count complaint against the Trust and the Trustee Defendants for declaratory and injunctive relief in the Delaware Chancery Court, contending that the potential withholding tax obligation that it had been apprised of fourteen years earlier was not its primary responsibility under the Assignment Agreement. AmBase sought a preliminary injunction preventing the Trust from making distributions

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[5] If it had done so, the running of further interest would have been cut off, and if it ultimately proved that the taxes were not owed, AmBase would have received interest to compensate it for the loss of the time value of its money. *See* Rev. Proc. 84-58, 1984-2 C.B. 501; *see also* I.R.S. Announcement 86-108, 1986-45 I.R.B. 20.

that would endanger the Trust's ability to pay the withholding tax liability, which had by then grown to $141 million.[6] AmBase also sought the recovery of $3.2 million in legal expenses and related costs that it had allegedly incurred in connection with the IRS dispute and the Tax Court litigation. In particular, AmBase alleged that, when the IRS dispute arose during the 1980s, the Trustee Defendants apparently taking the position that AmBase was primarily responsible for the alleged withholding obligation, caused AmBase to effectively assume the costs and expenses of defending against the alleged withholding obligation without obtaining independent professional advice or guidance concerning whether the alleged withholding obligation was the primary obligation of Ambase, or the Trust, as successor to [City]. Competent and independent professional advisors likely would have informed management that the alleged withholding obligation was an obligation for which the Trust [was] primarily liable.

Count I of the complaint in the Delaware Action sought an order "declaring that the Trust, as successor to [City], is primarily liable for any alleged withholding obligation that is the subject of the [Tax Court litigation]" and alleged that such liability was based on "the Trust Agreement and the Assignment Agreement." In Count II, captioned "Restitution and Implied Contract," AmBase alleged that the Trust had been "unjustly enriched" by AmBase's expenditure of the $3.2 million in legal expenses

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[6] Eight months before the Delaware Action was commenced, the Trust reported having assets with an aggregate value of approximately $73 million, slightly more than half of the potential withholding tax liability.

associated with the Tax Court litigation and that "equity imposed an obligation on the Trust to repay [these] costs and expenses incurred on [the Trust's] behalf by AmBase," which was "entitled to restitution from the Trust" for these expenditures. In September 2000, the Trust and the Trustees moved to dismiss the Delaware Action on the grounds that the causes of action alleged were time barred by the Delaware statute of limitations and that the complaint failed to state claims upon which relief could be granted.

In a December 14, 2000 ruling from the bench (which was later memorialized in an unpublished order dated February 3, 2001), the Delaware Chancery Court dismissed the Delaware Action with prejudice "solely on the ground that it [was] barred by the statute of limitations and the doctrine of laches." In ruling from the bench, the Chancery Court began its analysis by describing the claims alleged by AmBase as essentially saying: "This primary liability was never contractually shifted from [City] to AmBase. It never was there in the first place. We shouldn't be dealing with this. It is not within the scope of the agency that we took on." Turning to the question of the timeliness of the Delaware Action, the Chancery Court stated:

> Giving AmBase all of its due, the claim began to run at least as early as the notice of deficiency, because if you don't act on the notice of deficiency by challenging it, it is going to be reduced to a judgment. All along this has been a sum certain, and interest has been running.

The Chancery Court then turned to AmBase's allegations that Delaware's three-year statute of limitations should have been equitably tolled because the Trustee

Defendants' presence on AmBase's Board of Directors created a conflict of interest that prevented the Board from acting sooner. The court began its analysis with the facts pleaded in the complaint that there were no Trustees remaining on AmBase's Board by the end of 1995 and that, by the end of 1996, Trustee Mantell stopped serving as an officer of AmBase. Therefore, by the end of 1996, "this cloud that supposedly kept this corporate entity from discovering a claim that was based on a contract that was out there in the open" had been lifted.

The Chancery Court issued an unpublished written decision dated February 7, 2001, in which it denied AmBase's motion for reargument and sought to expound further on its ruling from the bench. After recapping the facts of the case, the court characterized its prior discussion of when AmBase's claims accrued as follows:

> In sum, AmBase's claims that the Trust [was] primarily responsible for the potential withholding tax liability, that it should be required to set aside assets sufficient to satisfy that liability, and that it and not AmBase should bear the cost of contesting the liability were surely ripe as of 1995, if not in 1986. These claims could also have been explicitly framed as breaches of the Trust's obligations under the Assignment Agreement; they are in fact pled implicitly as such now.

(footnotes omitted).

The court then turned to its earlier treatment of AmBase's equitable tolling argument (i.e., that the Trustee Defendants "fraudulently concealed the basis for AmBase's claims or that the claims were inherently undiscoverable before all of [the Trustee Defendants had] departed [from] AmBase"). The court noted "how thin" it had found AmBase's

equitable tolling argument to be based on the facts that (1) a majority of AmBase's Board had always been comprised of directors who were not affiliated with the Trust and who were aware of the Trustee Defendants' affiliations with the Trust; and (2) the facts necessary to learn of AmBase's potential liability for the withholding taxes were contained in the Assignment Agreement and the Code, neither of which was "concealed." Even though the court had found AmBase's equitable tolling argument to be "weak," it noted that, "in the end" it had not based its dismissal on a "holding that the statute of limitations began to run *before* the last of the Trustee Defendants had left AmBase," i.e., in 1986 or 1995. (emphasis added). Instead, the court held that the equitable tolling argument lacked merit, assuming for the purposes of that holding that AmBase's claims accrued as late as December 1996.

V. District Court Proceedings and Resolution of the Tax Dispute

In January 2001 (after the Delaware Chancery Court had dismissed the Delaware Action but while AmBase's motion for reargument of that decision was pending), AmBase commenced the action giving rise to this appeal by filing a six-count complaint in the District Court against the Trust and the Trustee Defendants. The factual allegations in this complaint closely mirrored those in the complaint filed in the Delaware Action. For example, in Count I of the complaint, AmBase once again sought a declaration that the Trust rather than AmBase was primarily liable for the payment of the disputed withholding taxes and accrued interest, alleging that the liabilities AmBase assumed in the Assignment Agreement did not include the obligation to pay the withholding taxes, which

accordingly fell among the other liabilities of City that were assumed by the Trust. AmBase also again sought a declaration that it was entitled to reimbursement from the Trust of the $3.2 million in legal expenses that AmBase had incurred in the Tax Court litigation. In addition to this declaratory relief, AmBase once again sought injunctive relief preventing the Trustees from winding up the Trust's affairs or disbursing any Trust assets to the beneficiaries of the Trust. And, in Count II of the complaint, AmBase once again alleged causes of action sounding in restitution, unjust enrichment, and implied contract, seeking the return of the $3.2 million in legal expenses that AmBase had incurred in the Tax Court litigation.

AmBase also alleged two additional causes of action that are relevant to this appeal.[7] In Count III of the complaint, AmBase alleged that the Trustee Defendants breached the fiduciary duties that they owed to AmBase as a result of the conflicts of interest created by their dual service as Trustees of the Trust and officers and directors of AmBase. In particular, AmBase alleged that the Trustee Defendants breached their fiduciary duties to AmBase by: (i) "improperly attempting to impose upon AmBase a purported withholding tax obligation that was and remained the lawful obligation of the Trust"; (ii) "failing or refusing to obtain independent and competent advice concerning the subject of whether the alleged withholding obligation was properly the responsibility of the Trust";

[7] AmBase has not pursued on appeal the District Court's dismissal of its remaining claims for fraudulent conveyance and professional negligence/malpractice that were alleged, respectively, in Counts V and VI of the complaint.

(iii) "causing AmBase to incur substantial expenses, including attorneys' fees, in attempting to eliminate or minimize the potential exposure relating to the alleged withholding obligation"; (iv) "failing to properly inform new management of AmBase that the withholding tax obligation was one that [was] properly borne, if at all, by the Trust"; and (v) "causing the Trust to distribute hundreds of millions of dollars to [City's] former stockholders [i.e., the beneficiaries of the Trust] when they knew or, in the absence of gross negligence should have known, that the Trust was primarily liable for the alleged withholding[ ] obligations."

In addition to its breach of fiduciary duty claim, AmBase also pleaded a cause of action sounding in indemnification in Count IV of the complaint. In particular, AmBase alleged, pursuant to the Assignment Agreement or the Trust Agreement, that it was entitled to contractual indemnification from the Trust for the legal expenses it incurred in the Tax Court litigation.

In February 2001, the Defendants moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss AmBase's complaint on the ground that, inter alia, the causes of action pleaded therein were barred by New York's six-year statute of limitations. The gravamen of the Defendants' motion was that AmBase's claims accrued in 1986 – the date when the IRS issued its Revenue Agent's Report – and that the Delaware Chancery Court's decision in the Delaware Action collaterally estopped AmBase from claiming otherwise. Thus, the Defendants argued, AmBase's claims were time barred some time in 1992. Alternatively, the Defendants argued that, if AmBase's claims accrued as late as December 1996 (when the last of the Trustee Defendants departed from AmBase), under New York's "discovery

rule,"[8] AmBase had only two additional years from 1996 in which to file suit, so its claims were time barred after 1998.

While the District Court action was pending, on May 23, 2001, the Tax Court resolved the dispute between AmBase and the IRS in favor of AmBase, holding that neither City nor AmBase was liable for the withholding taxes on the interest payments made to the foreign bond holders. *See AmBase,* 81 T.C.M. (CCH) at 1670. The IRS did not appeal. Consequently, because the Tax Court held in favor of AmBase and there was no longer any liability for the withholding taxes, AmBase's only remaining claim before the District Court was for the $3.2 million in legal expenses, which it alleged that the Trust should pay.

Following its victory in the Tax Court, AmBase sought leave in October 2001 to amend its complaint to include two additional causes of action – one for breach of contract and one for breach of a contract to which AmBase was a third-party beneficiary. In the breach of contract claim, AmBase alleged that the Trust breached the Assignment Agreement by: (i) "designating AmBase as [City's] agent for purposes of the [tax dispute with the IRS] and refusing

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[8] New York's discovery rule provides, in relevant part, that:

> Where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

N.Y. C.P.L.R. 203(g) (McKinney 2002).

to acknowledge the primary liability therefor"; (ii) "transferring the [tax dispute with the IRS] to AmBase"; and (iii) "failing to be primarily liable for the payment, discharge and performance of the obligations associated with the [tax dispute with the IRS] and the costs and expenses of the [Tax Court litigation] and otherwise failing to live up to the terms and conditions of the Assignment Agreement." In the third-party beneficiary claim, AmBase alleged that it was an intended third-party beneficiary of the Trust Agreement between City and the Trust and that the Trust breached the Trust Agreement by failing to "compensate AmBase for its costs, expenses, and legal fees associated with [the Tax Court litigation]." The District Court decided to defer consideration of AmBase's request for leave to amend its complaint until after it had addressed the Defendants' motion to dismiss the original complaint.

In an unpublished opinion and order dated January 11, 2002, the District Court granted the Defendants' motion to dismiss. As an initial matter, the District Court rejected the Defendants' collateral estoppel argument, finding that the Delaware Chancery Court had not specified that AmBase's claims accrued in 1986. According to the District Court, all that was needed to support the Chancery Court's decision that those claims were time barred under the Delaware three-year statute of limitations was that the claims accrued no later than August 14, 1997, i.e., three years before the commencement of the Delaware Action. In particular, the District Court reasoned that no finding had been made by the Chancery Court other than that "the claims were barred because they accrued at some earlier time and nothing supported a tolling of the [Delaware] statute of limitations beyond 1996, which was over three years before AmBase" commenced the

Delaware Action. The District Court then dismissed as a matter of law the restitution, unjust enrichment, implied contract, and breach of fiduciary duty claims as being time barred. The District Court agreed with the Defendants' argument that these claims accrued either in 1986 (in which case they were time barred six years later in 1992) or in 1996 (in which case they were time barred two years later in 1998). The District Court next dismissed AmBase's contractual indemnity claim for failing to state a claim upon which relief could be granted. In reaching this conclusion, the District Court interpreted the Assignment Agreement as not providing for indemnification as a matter of law.

Six days later, the District Court entered final judgment dismissing all of AmBase's claims. On January 25, 2002, AmBase moved, pursuant to Fed. R. Civ. P. 59(e) and 60(b), to alter or amend the judgment and again requested leave to amend its complaint to include the breach of contract and third-party beneficiary contract claims referenced above. The District Court denied AmBase's motion by a memorandum endorsement dated February 14, 2002, stating that the proposed amendments to AmBase's complaint would be "futile because they would do nothing to alter the date of accrual under the six year statute of limitations . . . which applies equally to actions upon an express or an implied contractual obligation or liability." This timely appeal followed.

DISCUSSION

I. Standard of Review

A complaint should not be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which

relief can be granted " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Cooper v. Parsky,* 140 F.3d 433, 440 (2d Cir. 1998) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). A court's task "in ruling on a Rule 12(b)(6) motion 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.' " *Cooper,* 140 F.3d at 440 (quoting *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.,* 748 F.2d 774, 779 (2d Cir. 1984)). Furthermore, a court must "accept as true all factual allegations in the complaint." *Cooper,* 140 F.3d at 440. Finally, "we are entitled to affirm ... on any ground for which there is support in the record, even if not adopted" by the District Court. *Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582,* 305 F.3d 82, 88 (2d Cir. 2002). In particular, we can affirm the dismissal of a complaint for failure to state a claim based on the affirmative defense of res judicata if "all relevant facts are shown by the court's own records," of which we can take judicial notice. *Day v. Moscow,* 955 F.2d 807, 811 (2d Cir. 1992).

II. Res Judicata

Where there is a final state court judgment, a federal court looks to that state's rules of res judicata to determine the preclusive effect of that judgment. *Town of Deerfield, N.Y. v. FCC,* 992 F.2d 420, 429 (2d Cir. 1993) (citing 28 U.S.C. § 1738). Thus, to determine the preclusive effect of the judgment in the Delaware Action, we must look to the Delaware courts' rules of res judicata. In Delaware, a claim is barred by res judicata if: (1) the court that adjudicated the prior action had jurisdiction to do so; (2) the

parties to the subsequent action are the same as (or privies to those in) the prior action; (3) the causes of action in both cases are the same or the subsequent action arises from the same transaction that formed the basis of the prior action; (4) the merits in the prior action were decided adversely to the contentions of the plaintiff; and (5) the prior action was final. *Maldonado v. Flynn,* 417 A.2d 378, 381 (Del. Ch. 1980). Here, four of these five elements need not detain us long. The Chancery Court plainly had subject matter and personal jurisdiction to adjudicate the Delaware Action. The parties to the Delaware Action were the same as the parties to the case at bar. The dismissal of the Delaware Action was adverse to AmBase and was a dismissal on the merits. *See Loving v. Pirelli Cable Corp.,* 11 F. Supp. 2d 480, 491-92 (D. Del. 1998) (dismissal of action by a Delaware court as time barred by the Delaware statute of limitations is a dismissal on the merits for res judicata purposes), *aff'd mem.,* 178 F.3d 1279 (3d Cir. 1999); *Williamson v. Columbia Gas & Elec. Corp.,* 91 F. Supp. 874, 880 (D. Del.) (same), *aff'd,* 186 F.2d 464 (3d Cir. 1950); *Townsend v. Chasanov*, No. 129, 1995, 1995 Del. LEXIS 367 (Oct. 11, 1995) (same).". Finally, the judgment dismissing AmBase's claims in the Delaware Action was final.[9]

The only element to which we must devote further attention concerns whether the causes of action were the same in both cases or whether the instant action arises

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[9] Although on March 8, 2001, AmBase appealed the Chancery Court's decision to the Delaware Supreme Court, AmBase voluntarily dismissed its appeal two weeks later, *see AmBase Corp. v. City Inv. Co. Liquidating Trust,* No. 106,2001 (Del.) (Docket Entry Nos. 4-6).

from the same transaction that formed the basis of the Delaware Action. This "transactional view" of claim preclusion was succinctly explained by the Delaware Chancery Court in *Maldonado*:

> In earlier times the doctrine of res judicata could be invoked only to bar the relitigation of the same cause of action already litigated and determined. . . . The modern transactional view of the doctrine of res judicata, however, does not require that the claim subsequently asserted be based on [the] same cause of action to be barred, but permits the doctrine to be invoked to bar litigation between the same parties if the claims in the later litigation arose from the same transaction that formed the basis of the prior adjudication. . . . The determination, therefore, whether the doctrine shall be invoked is now based on the underlying transaction and not on the substantive legal theories or types of relief which are sought. Under the modern rule, ordinarily, a transaction gives rise to only one claim regardless of the number of ways that the claim may be asserted. . . . In deciding whether res judicata will bar [a] suit, [the plaintiff's claims] must therefore be analyzed in the light of the transaction [that] he challenges; and, if [the plaintiff's] complaint [in the previous action] and his complaint [in the subsequent action] assert different substantive theories concerning but one claim arising from but one transaction, the doctrine of res judicata may prohibit a second adjudication.

417 A.2d at 381-82 (citations omitted). Here, "transaction" refers to a "common nucleus of operative facts." *Schnell v. Porta Sys. Corp.*, CA No. 12,948, 1994 Del. Ch. LEXIS 47, at *11 (Apr. 12, 1994) (citing *Maldonado*); *see also Restatement (Second) of Judgments* § 24 cmt. b (1982). In

other words, "if the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action," then the claims in the second action are precluded. *Ezzes v. Ackerman,* 43 Del. Ch. 420, 234 A.2d 444, 445-46 (Del. 1967). This rule against claim splitting "is based on the belief that it is fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times." *Maldonado,* 417 A.2d at 382. Therefore, when "a plaintiff has had a full, free and untrammelled opportunity to present his facts, but has neglected to present some of them or has failed to assert claims [that] should in fairness have been asserted, he will ordinarily be precluded by the doctrine of res judicata from subsequently pressing his omitted claim in a subsequent action." *Id.* (internal quotation marks omitted).

Turning to the causes of action pleaded here, we initially note that the causes of action, facts alleged, and relief sought in Counts I and II of the original complaint (declaratory relief, injunctive relief, restitution, implied contract, and unjust enrichment) are virtually the same as those pleaded in Counts I and II of the complaint in the Delaware Action. These claims are thus precluded.

With respect to the two additional claims pleaded here that were not pleaded in the Delaware Action (breach of fiduciary duty and express contractual indemnification), they too are precluded because, although they are different substantive theories from those pleaded in the Delaware

Action, they concern but one claim arising from but one common nucleus of operative facts. For example, the allegations underlying the breach of fiduciary duty claim essentially state that the Trustee Defendants could not serve as both Trustees of the Trust and officers/directors of AmBase because they suffered from a conflict of interest. This conflict of interest allegation was encompassed in the issue framed in the Delaware Action: whether the Trust or the Trustee Defendants improperly failed to assume City's withholding tax liabilities. In fact, this conflict of interest was litigated and decided by the Delaware Chancery Court when it rejected AmBase's equitable tolling argument on the grounds that (1) the Trustee Defendants comprised a minority of the AmBase Board and therefore were unable to influence the position taken by AmBase with regard to the tax payments and (2) all the relevant information necessary for the disinterested directors (who made up a majority of AmBase's Board) to determine whether AmBase was required to pay the disputed taxes was available to all.

With respect to the contractual indemnification claim, that too arose out of the same common nucleus of facts that gave rise to the claims pleaded in the Delaware Action and also sought reimbursement of the litigation expenses incurred in the Tax Court litigation. Specifically, the complaint in the Delaware Action alleged that "pursuant to the Trust Agreement and the Assignment Agreement, the alleged withholding obligation is the primary responsibility of the Trust." Indeed, the Chancery Court said of the claims pleaded in the Delaware Action that

they "could also have been explicitly framed as breaches of the Trust's obligations under the Assignment Agreement" and were "in fact pled implicitly as such."[10]

Turning to the claims pleaded in AmBase's proposed amended complaint, it cannot be gainsaid that the breach of contract and breach of third-party beneficiary contract claims also arose out of the same common nucleus of facts as the claims alleged in the Delaware Action. Each of these claims could have been brought in the Delaware Action because they sought reimbursement of the Tax Court litigation expenses pursuant to agreements that were relied on in the Delaware Action.

Accordingly, we conclude that the claims brought in the District Court were barred by the doctrine of res judicata either because they were the same claims brought in the Delaware Action or because they arose from the same common nucleus of facts as the claims in the Delaware Action. Because we are affirming on this alternative basis, we decline to reach the question of whether the District Court properly dismissed AmBase's indemnification claim for failing to state a claim upon which relief could be granted and its remaining claims as time barred under New York's statute of limitations.

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[10] On appeal, AmBase characterizes its indemnification claim as both an express indemnification claim and an implied indemnification claim. While we are skeptical about whether the complaint can be read to include an implied indemnification claim, such a claim would, in any event, be precluded for the same reasons that we find the express indemnification claim is precluded: it arises out of the same common nucleus of facts that was the subject of the Delaware Action.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is affirmed.

AmBASE CORPORATION, A Delaware corporation, Plaintiff, v. CITY INVESTING COMPANY LIQUIDATING TRUST, as Successor to CITY INVESTING COMPANY, a dissolved Delaware corporation, and GEORGE T. SCHARFFENBERGER, EBEN W. PYNE and LESTER J. MANTELL, Individually and as Trustees of the CITY INVESTING COMPANY LIQUIDATING TRUST, Defendants.

01 Civ. 0771 (LLS)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

2002 U.S. Dist. LEXIS 482

January 11, 2002, Decided
January 15, 2002, Filed

COUNSEL: For AMBASE CORPORATION, plaintiff: Philip M. Halpern, Collier, Halpern, Newberg, Nolletti & Bock, L.L.P., White Plains, NY.

JUDGES: LOUIS L. STANTON, U.S.D.J.

OPINION BY: LOUIS L. STANTON

OPINION: Opinion and Order

Defendants move to dismiss the complaint as barred by the statute of limitations. The motion is granted.

Background

Plaintiff AmBase Corporation ("AmBase"), a Delaware corporation with its principal place of business in Connecticut, was formed in 1975 as a wholly owned subsidiary of City Investing Company ("City Investing"). In 1985, in anticipation of the dissolution and liquidation of City Investing, AmBase and City Investing entered an Assignment and

Assumption Agreement ("Assignment Agreement") in which AmBase assumed certain liabilities of City Investing, including an obligation to pay certain income taxes. At about the same time, defendant City Investing Company Liquidating Trust ("the Trust") was formed to assume the liabilities of City Investing "not otherwise provided for." Compl., ¶ 3. Thereafter, City Investing was dissolved and liquidated. Three former AmBase officers and directors, George T. Scharffenberger, Eben W. Pyne, and Lester J. Mantell, have been trustees of the Trust since 1985, although none has been an officer or director of AmBase since Mantell left it in 1996.

In March 1986, as a result of an audit of a City Investing subsidiary, the United States Internal Revenue Service ("IRS") issued a Revenue Agent's Report claiming that AmBase, as agent for City Investing, owed certain amounts which should have been withheld for income tax purposes (the "withholding taxes") in the years 1979 and 1980 from payments made by a subsidiary of City Investing. AmBase began to incur legal expenses and other fees (for which it now seeks compensation from the Trust) in 1986 in an effort to resolve the complexities involved, and to persuade the IRS that City Investing did not owe the withholding taxes.

Over the next few years, the IRS issued other reports in the same connection for the tax years 1981 to 1986.

On May 11, 1995 the IRS filed a Notice of Deficiency, seeking a total of $20.9 million in withholding taxes plus interest from AmBase. On June 29, 1995, AmBase sued in Tax Court, contesting the IRS's claim.

In January 2001 AmBase brought this suit against the Trust seeking a declaration that the Trust rather than

AmBase was primarily liable for the $20.9 million in withholding taxes and $120 million in accrued interest by then sought by the IRS, arguing that the liabilities AmBase assumed in the Assignment Agreement did not include the obligation to pay the withholding taxes, which accordingly fell among the other City Investing liabilities assumed by the Trust. AmBase also sought reimbursement from the Trust of $3.2 million AmBase had spent in legal fees. Finally, AmBase sought compensatory damages against the individual trustees for breach of fiduciary duty and against defendant Lester Mantell (a tax lawyer, former AmBase officer, and present trustee of the Trust) for professional negligence and malpractice, for his alleged concealment and failure to advise AmBase that the liability was the Trust's.

Recently, on May 23, 2001, the Tax Court held in favor of AmBase. *See AmBase Corp. v. Commissioner of Internal Revenue,* T.C. Memo 2001-122, 81 T.C.M. (CCH) 1657, 2001 Tax Ct. Memo LEXIS 150 (United States Tax Court, May 23, 2001). It held that neither City Investing nor AmBase was liable for the withholding taxes. The IRS did not appeal. Because the Tax Court held in favor of AmBase and there is no liability for the withholding taxes, AmBase's only remaining damages are the $3.2 million in legal fees, which it claims the Trust should pay.

The defendants move to dismiss under the New York six-year statute of limitations (except as to the malpractice claim, see page 14 below) and claim collateral estoppel in their favor, based on a December 14, 2000 decision of Chancellor Strine of the Delaware Court of Chancery dismissing a suit, substantially similar to this one, which AmBase filed in 2000 in that court. Chancellor Strine ruled from the bench that AmBase's claims were barred by

the Delaware three-year statute of limitations and laches ("Strine Ruling"). On February 7, 2001, he denied AmBase's motion for reargument ("Reargument Opinion").

In its motion to dismiss the Delaware suit, the defendants argued that AmBase's claims accrued in March 1986, when the IRS first issued the report claiming that AmBase, on behalf of City Investing, owed withholding taxes. Defendants asserted that the last possible accrual date of the plaintiff's claims was December 1996, when Mantell left AmBase, because thereafter AmBase could no longer claim tolling of the statute of limitations while the trustee-defendants were "fraudulently concealing the Trust's liability from AmBase." Compl., ¶ 1. Thus, since the suit was commenced in 2000, it was barred by the Delaware three-year statute. Chancellor Strine agreed and dismissed it.

In this present suit, the defendants again assert that the claims accrued in 1986, rendering them untimely under the six-year New York statute of limitations. They also urge that, even if plaintiff's claims were tolled while Mantell allegedly fraudulently concealed AmBase's rights from AmBase, that tolling ceased when he left in 1996. Defendants argue that under the discovery rule, N.Y. C.P.L.R. 203(g), plaintiff only had two additional years from 1996 in which to sue, and suit was barred after 1998.

AmBase argues that its claims did not accrue until 2000, when it discovered and asserted them, and the Trust rejected its demands. Alternatively, it asserts that its claim for indemnity of its legal fees and costs accrued in 2001, when the Tax Court issued its decision. Finally, AmBase submits that its claims accrued at the earliest in 1995, when the IRS issued its Notice of Deficiency, or in

1996, when Mantell left AmBase, making them timely under the New York six-year limitations period[1].

Discussion

1.

Defendants assert that Chancellor Strine held that AmBase's claims accrued in 1986, which they say is a determination that collaterally estops AmBase from asserting that its claims accrued later.

Chancellor Strine's actual holding was that AmBase's claims were untimely under the Delaware three-year statute of limitations. All that was needed to support that holding was his finding that, whenever the claims accrued, it was more than three years before AmBase sued on August 14, 2000. It was sufficient for Chancellor Strine to state, as he did, that AmBase's claims against the defendants were "surely ripe as of 1995, if not in 1986" (Reargument Opinion, at 9). Chancellor Strine did not fix the exact date when the claims accrued. Rather, he held that the claims were barred because they accrued at some earlier time and nothing supported a tolling of the statute of limitations beyond 1996, which was over three years before AmBase brought suit. In denying AmBase's motion for reargument, Chancellor Strine stated (p. 14-18):

> But, in the end, I did not rest my dismissal decision on a holding that the statute of limitations

[1] Except the malpractice claim, which AmBase does not dispute is time barred by a three-year limitations period.

began to run before the last of the Trustee Defendants had left AmBase.

Instead, I noted the undisputed fact that all of the Trustee defendants had left AmBase's service by December 1996. Thus, any influence the Trustee Defendants had over AmBase was gone as of that point.

. . .

I held that it was clear that AmBase's claims were ripe as of December 1996, that any influence of the Trustee Defendants was gone as of that time, that AmBase possessed all the knowledge it needed to file suit within three years of that time, and that it did not do so.

Since Chancellor Strine's statements about accrual dates for AmBase's claims[2] earlier than 1996 were dicta, relitigation of that question is not precluded. Because New York has a longer statute of limitations for almost all of

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[2] *E.g.:*

I think that kind of suit could have been brought in 1986. . . .

. . .

And I think it is proven that the case could have been brought by the fact that the case now seeks defense costs back to 1986. . . . Giving AmBase all of its due, the claim began to run at least as early as the notice of deficiency, because if you don't act on the notice of deficiency by challenging it, it is going to be reduced to judgment.

(Strine Ruling, at 3-4); "At that time, I reasoned that AmBase could have brought this action against the Trust as early as 1986, when the Revenue Report was issued, and certainly by 1995, when the Notice of Deficiency was issued." (Reargument Opinion, at 8).

AmBase's claims, this court must determine their exact date of accrual.

2.

A. Restitution, Unjust Enrichment and Implied Contract Claims

AmBase alleges that "Since 1986, AmBase has incurred legal expenses and related costs in the amount of approximately $3.2 million in connection with the IRS dispute and the Withholding Tax Litigation," Compl., ¶ 19, and seeks "all of its costs and expenses incurred in defending against the alleged tax obligation and in prosecuting the Withholding Tax Litigation including its reasonable attorneys' fees," *id.*, p. 17, ¶ C. AmBase claims that the defendants were "unjustly enriched as a result of the benefit conferred at AmBase's expenses [sic] by the payment of these legal fees." *Id.*, ¶ 32.

A claim for unjust enrichment "starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution." *Congregation Yetev Lev D'satmar, Inc. v. 26 Adar N.B. Corp,* 192 A.D.2d 501, 596 N.Y.S.2d 435, 437 (A.D. 2nd Dep't 1993) (citation omitted). The "wrongful act" alleged in the complaint occurred when the defendant-Trustees "endeavored to foist such alleged withholding tax liability upon AmBase," Compl., ¶ 17, which was "when the withholding tax dispute with the IRS arose in the mid-1980s." *Id.*, ¶ 15. As Chancellor Strine put it, "as AmBase's claims for reimbursement for its expenses back to 1986 demonstrates, AmBase had a litigable dispute with the Trust over which entity should have to deal with the IRS." Reargument Opinion, at 9. AmBase's complaint alleges that "Since 1986, AmBase has incurred expenses" unjustly

enriching the Trust, which had the primary obligation to pay the expenses.

On the case as a whole, these claims accrued in 1986, when AmBase received the Revenue Agent's Report and began the work, and incurring the costs, of opposing it. The Notice of Deficiency issued in 1995 continued, but did not commence, the process of defense and the incurring of its costs.

AmBase's position, reiterated in all its claims, is that the statute of limitations begins to run when it learned that the Trust, not AmBase, should have paid these costs.

The statute of limitations, however, runs from the time of a breach or injury and "'knowledge of the occurrence of the wrong on the part of the plaintiff is not necessary.'" *Ely-Cruikshank Co. v. Bank of Montreal,* 81 N.Y.2d 399, 599 N.Y.S.2d 501, 503, 615 N.E.2d 985 (Ct. App. 1993) (quoting *Varga v. Credit-Suisse,* 5 A.D.2d 289, 171 N.Y.S.2d 674). No fresh breach or "wrongful act giving rise to a duty of restitution" occurred in 1995, 1996 or 2000.

When, through no fault of its own, a plaintiff lacks knowledge of its claims because the defendant concealed them (as alleged here), the statute of limitations is equitably tolled until "'plaintiff either acquires actual knowledge of the facts that comprise [its] cause of action or should have acquired such knowledge through the exercise of reasonable diligence after being apprised of sufficient facts to put [it] on notice.'" *Glynwill Investments, N.V. v. Prudential Securities, Inc.,* 1995 U.S. Dist. LEXIS 8262, 1995 WL 362500 (S.D.N.Y. June 16, 1995), at *3, quoting *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 460 (2d Cir. 1974). That tolling does not change the time the claim accrued, but merely excuses a delay in suit until actual or imputed

discovery. At that point, the situation is governed by N.Y. C.P.L.R. § 203(g) which provides:

> where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

In this case, that means within six years from 1986 when the claims accrued, or two years from when they should have been discovered, whichever is longer.

As Chancellor Strine held, any equitable tolling due to the trustee's misrepresentations ended in 1996, when all of the trustees left the service of AmBase (Reargument Opinion, at 14-15):

> Given that the Assignment Agreement was fully available to AmBase, as was the IRS Code, there was no reason why AmBase could not have asserted its claim within three years after Mantell's December 1996 departure. AmBase had full notice of the fact that the Assignment Agreement was the basis for it assuming primary liability for City's withholding tax liability. AmBase thus had the information to decide whether to assert a claim. All its board or management had to do was instruct someone to read the contract and the IRS Code.
>
> . . .
>
> Given all these circumstances, I held that AmBase's argument that the statute of limitations

was equitably tolled beyond December 1996 to be without merit.

Since the unjust enrichment and related claims accrued in 1986, under the six-year statute of limitations, N.Y. C.P.L.R. § 213(2) (McKinney 2000), they are untimely when calculated from their date of accrual. When calculated from their imputed time of discovery in 1996, they are untimely because this present suit was not commenced within the additional two years granted by New York's discovery rule, C.P.L.R. § 203(g), *see Glynwill,* 1995 U.S. Dist. LEXIS 8262, 1995 WL 362500, at *4 ("Because the doctrine of equitable tolling is subsumed within § 203(g), *Riis v. Manufacturers Hanover Trust Co.,* 632 F. Supp. 1098, 1105 n.4 (S.D.N.Y. 1986), applicability of that doctrine cannot extend the limitations period beyond the two years prescribed by the statute."). Under any view, the latest that AmBase should have brought its claim was 1998.

B. Indemnity Claim

AmBase also seeks its legal fees and expenses under a theory of indemnification. *See* Compl., ¶¶ 40-42. Since accrual of an indemnity claim "occurs upon payment by the party seeking indemnity," *McDermott v. City of New York,* 50 N.Y.2d 211, 428 N.Y.S.2d 643, 646, 406 N.E.2d 460 (Ct. App. 1980), AmBase asserts that its indemnity claim did not accrue until May 2001, when there was a final determination by the Tax Court.

AmBase's claim that the Trust was liable for defending the tax litigation rests on its interpretation that the Assignment Agreement does not burden it with "withholding taxes;" nothing in the Agreement contemplates that

AmBase would assume liabilities to be reimbursed by the Trust in the future. The Assignment Agreement does not envision that AmBase would defend against claims by the IRS and be reimbursed later. Rather, the Agreement stated that AmBase would assume certain tax liabilities of City Investing. As Chancellor Strine stated (Strine Ruling, at 2-3):

> This is not a case of sort of secondary indemnification, where someone has a contract in which they are primarily liable and they know that some other corporation or some other source is secondarily liable and where there is no expectation that the party that is secondarily liable will do anything until a liability really arises. That is not this kind of case. This wasn't a situation where AmBase was expected to defend this for 20-some odd years and then be able to just turn around at the time of a judgment and say to the liquidating trust, "Now you pay the judgment."

Thus, there is no basis for a contractual claim of indemnity arising in May 2001 when the tax litigation became final. Any claim to indemnity arises, not under the Assignment Agreement, but solely because it is imposed or implied by the law: in other words, by the unjust enrichment equitable claims dismissed above.

C. Breach of Fiduciary Duty Claim

AmBase alleges that the individual defendant-trustees should have informed AmBase that the Trust, rather than AmBase, was responsible for the legal fees and expenses of defending against the IRS claims. It claims that, as officers and directors of AmBase, they breached duties of "loyalty,

care and good faith" beginning when "the withholding tax dispute with the IRS arose in the mid-1980s." Compl ., ¶ 15.

Under C.P.L.R. § 213(7), a claim by a corporation against a present or former director or officer, like a breach of contract claim, accrues "upon breach, rather than plaintiff's discovery of the breach." *Whitney Holdings, Ltd. v. Givotovsky,* 988 F. Supp. 732, 743 (S.D.N.Y. 1997).

AmBase asserts that its claim accrued in 1996 when Mantell left AmBase because the trustee-defendants continually breached their fiduciary duties up until that time. The complaint, however, does not allege fresh breaches that occurred after the original breach in the "mid-1980s" when the trustee-defendants "endeavored to foist such alleged withholding tax liability upon AmBase." Compl., ¶ 17. The fact that the trustee-defendants remained officers and directors of AmBase does not mean that their alleged breaches reoccurred over and over again until Mantell left in 1996. *Cf. Korn v. Merrill,* 403 F. Supp. 377, 388 (S.D.N.Y. 1975) (holding that defendant investment advisor's continued receipts of fees from plaintiff after it made fraudulent representations to the plaintiff were not "a series of independent and continuing injuries" which could extend the statute of limitations, but merely elements of plaintiff's damages); *Lowell Wiper Supply Co. v. The Helen Shop, Inc.,* 235 F. Supp. 640, 644 (S.D.N.Y. 1964) (continual excessive rental payments on renewal leases, allegedly entered into due to defendant fiduciary's fraud, did not give "rise to a separate and distinct cause of action. . . . ")

Like AmBase's other claims, the breach of fiduciary duty claim accrued in 1986, and is barred under the six-year statute of limitations and the two year discovery rule.[3]

D. Professional Negligence and Malpractice Claim

AmBase alleges that Mantell, "AmBase's professional tax advisor," committed malpractice by failing "to provide competent and reliable advice on matters regarding AmBase's tax or tax-related liabilities." Compl., ¶ 50.

AmBase does not dispute that the statute of limitations for professional negligence and malpractice is three years under C.P.L.R. § 214(6), *see* Pl. Memo dated March 9, 2001, at 23, and it is dismissed.

CONCLUSION

The defendants' motion to dismiss based on the statute of limitations is granted. The Clerk shall dismiss the complaint.

So ordered.

DATED: New York, New York

January 11, 2002

LOUIS L. STANTON

U.S.D.J.

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[3] The claims against Pyne and Schaffenberger, two of the trustees, are barred even under plaintiff's continuing wrong theory because they left AmBase in 1993, more than six years before AmBase brought suit.

Ambase Corporation v. City Investing Company, et al
C.A. No. 18207

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2001 Del. Ch. LEXIS 16

February 7, 2001, Decided

COUNSEL: P. Clarkson Collins, Jr., Esquire, Morris, James, Hitchens & Williams, Wilmington, DE.

Kenneth J. Nachbar, Esquire, Morris, Nichols, Arsht & Tunnell, Wilmington, DE.

JUDGES: LEO E. STRINE, JR., VICE-CHANCELLOR.

OPINION BY: Leo E. Strine, Jr.

OPINION: Plaintiff Ambase Corporation has moved for reargument of my December 14, 2000 bench decision dismissing its claim against City Investing Liquidating Trust (the "Trust") and certain Trust affiliates on statute of limitations and laches grounds. That bench opinion was implemented by a final order on January 3, 2001.

To prevail on its reargument motion, Ambase must demonstrate that the court's prior decision "rested on a misunderstanding of a material fact or a misapplication of law."[1] "The court's focus on a motion under Rule 59(f) is solely on the facts in the record at the time of the decision."[2]

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[1] *Arnold v. Society for Savings Bancorp,* Del. Ch., C.A. No. 12883, 1995 Del. Ch. LEXIS 106, at *1, Chandler, V.C. (Nov. 5, 1990).

[2] *Price v. The Continental Insurance Co.,* 2000 Del. Ch. LEXIS 85, Del. Ch., C.A. No. 17219-NC, letter op. at 2, Lamb, V.C. (Mar. 3, 2000)

(Continued on following page)

In its motion, Ambase contends that the court misapprehended the law and the facts in dismissing its claims as time-barred. But its argument is premised on a misreading of the court's decision. The court's earlier decision relied upon undisputed facts and a view of the law the court continues to believe is correct. Moreover, Ambase relies upon a great deal of evidence that it failed to present during the earlier briefing. Ambase also raises new arguments. Neither the new evidence nor the new arguments are properly raised at this time. As a result, the court will deny Ambase's motion.

Factual Background

A brief recitation of the basic dispute will suffice. The underlying facts are drawn from Ambase's complaint. In 1975, City Investing Company ("City") formed a wholly-owned subsidiary called The Home Group, Inc., which is now the plaintiff Ambase. For simplicity's sake, I refer to The Home Group as Ambase.

In 1985, City engaged in a transaction whereby it distributed out its assets and liabilities. For purposes of this opinion, what is important is that City distributed its shares of Ambase out to City stockholders. City stockholders also received units in the Trust, which was also formed at that time and was responsible for all liabilities of City that were not otherwise provided for.

(*citing Miles, Inc. v. Cookson America, Inc.*, Del. Ch., 677 A.2d 505, 506 (1995)).

Put simply, the owners of City divided the assets and liabilities they solely possessed between two different entities. Pursuant to an August, 1985 Assignment Agreement, Ambase assumed certain liabilities of City. These included all "obligations of City for Federal income taxes (including all interest and penalties thereon) as common parent of the City Affiliated Group . . . "

When the Trust was created and Ambase was spun off, certain directors and officers of City (the "Trustee Defendants") occupied positions with both entities:

. Defendant George Scharffenberger has been a Trustee of the Trust since its creation, and served as Chairman of the Ambase board until January 24, 1993. Scharffenberger had been City's Chief Executive Officer at the time of the Assignment Agreement. Scharffenberger left Ambase seven and a half years before Ambase filed its complaint in this action.

. Defendant Eben Pyne has been a Trustee of the Trust since its creation, and was a member of the Ambase board until January 24, 1993. Pyne left Ambase seven and a half years before the complaint in this action was filed by Ambase.

. Defendant Lester J. Mantell has served as a Trustee of the Trust since its creation. Mantell had been a senior City officer before the Ambase spin-off, and served in high ranking positions at Ambase until his departure in December 1996. At Ambase, Mantell had significant responsibility for Ambase's handling of tax matters. Mantell left Ambase over three and a half years before its complaint in this action was filed.

In March 1986, the Internal Revenue Service (the "IRS") issued a Revenue Agent's Report contending that City had failed to properly withhold taxes for years 1979 and 1980 relating to the affairs of its Netherlands Antilles subsidiary. The IRS later extended that claim to years 1981 to 1985. The amount of the withholding at issue is nearly $21 million. As of March 1986, the accrued interest on that sum was around $10 million.

The Revenue Report was addressed to Ambase as City's agent under the Assignment Agreement. Ambase responded as if any liability owed by City was its responsibility under the Assignment Agreement. At that time, it is alleged that Mantell was Ambase's senior tax advisor and guided Ambase policy on the matter.

In 1986, Ambase did not pay the taxes alleged to be owed. If it had done so, the running of further interest would have been cut off. Moreover, if Ambase ultimately proved that the taxes were not owed, Ambase would have received interest to compensate it for the loss of the time-value of its money. Ambase also did not demand that the Trust pay the taxes allegedly owing, nor did it demand that the Trust assume the defense against the IRS.

Nine years then passed during which Ambase acted as if the potential tax liability was its responsibility.

On May 11, 1995, the IRS issued a Notice of Deficiency to Ambase claiming entitlement to the funds that it alleged should have been withheld. As of that time, defendants Scharffenberger and Pyne had left their positions at Ambase; defendant Mantell was still an officer there. Thus, as of the time Ambase received the Notice of Deficiency, the Ambase board had no members who were Trustees.

On June 29, 1995, Ambase filed a petition with the U.S. Tax Court on behalf of City contesting the alleged tax liability. As of 1995, the accrued interest on the withholding obligation of $21 million had risen to $61 million, for a total liability of over $80 million. Ambase did not seek to bring the Trust into the case or to sue the Trust.

As noted, defendant Mantell left Ambase's employment in December 1996.

1997 passed without Ambase claiming that the Trust, and not Ambase, was primarily responsible for the withholding tax.

1998 also passed without Ambase claiming that the Trust and not Ambase was primarily responsible for the withholding tax.

1999 passed without Ambase claiming that the Trust and not Ambase was primarily responsible for the withholding tax obligation.

The first seven and a half months of 2000 passed without Ambase claiming that the Trust and not Ambase was primarily responsible for the withholding tax obligation.

On August 14, 2000, Ambase filed its complaint for declaratory and injunctive relief in this court. At that time, Ambase for the first time contended that the potential withholding tax obligation that it had been apprised of for fourteen years was not its primary responsibility under the Assignment Agreement. Ambase sought a preliminary injunction preventing the Trust from making distributions that would endanger the Trust's ability to pay the withholding tax liability, which had by then grown to $141 million. The complaint also sought a recovery of Ambase's

expenses in dealing with the IRS since 1986, an amount equal to over $3 million.

The basis for the complaint was that the withholding tax liability of City for its Netherlands Antilles subsidiary was not assigned to Ambase under the Assignment Agreement as a primary liability of Ambase. Rather, that liability was primarily the Trust's, which had a duty to step up to the plate by defending against the IRS's claim and paying the liability if it ultimately was proved to be owed.

By the time the complaint was filed, the Trust had remaining assets of around $73 million, or slightly more than half of the potential withholding tax liability. The Trust had been funded with assets of between $150 million and $225 million. Between 1985 and 1990, the Trust had distributed over $280 million to former City stockholders who held Trust units. By 2000, the Trust was poised to make its final distributions and close down, if it could address certain environmental liabilities.

The Court's Prior Opinion

The Court's prior opinion was buttressed by the facts just articulated, all of which emerge from Ambase's own complaint. In that oral opinion, I concluded that Ambase's complaint was barred by the statute of limitations because the suit should have been brought at the latest no later than three years after Mantell's departure from his employment at Ambase.

At that time, I reasoned that Ambase could have brought this action against the Trust as early as 1986,

when the Revenue Report was issued, and certainly by 1995, when the Notice of Deficiency was issued.

These IRS documents quantified a specific liability that was allegedly owed as a result of City's withholding failures. Not only that, the liability was fixed in a manner that could be addressed in a financially and legally important manner. If the liability was paid subject to a contest, the liability was not subject to further interest payments and the payor was protected because interest would accrue to it if it prevailed against the IRS in the end.

Under Ambase's own theory, the Trust was the entity that had to address this liability. Because Ambase could be injured by the Trust's failure to satisfy the liability and cut off the running of interest or, alternatively, to set aside funds sufficient to pay the entire liability, it could have sued the Trust for failing to accept its contractual responsibilities. This failure obviously could compromise Ambase, which might be forced to bear the whole liability if the Trust distributed its assets and did not provide for an obligation primarily assigned to it, and not Ambase.

Furthermore, as Ambase's claims for reimbursement for its expenses back to 1986 demonstrates, Ambase had a litigable dispute with the Trust over which entity should have to deal with the IRS. If the Assignment Agreement did not assign the potential liability primarily to Ambase, it was the Trust's duty to defend the claim and Ambase would only be exposed if the Trust lost and was unable to make the government whole.

In sum, Ambase's claims that the Trust is primarily responsible for the potential withholding tax liability, that it should be required to set aside assets sufficient to satisfy that liability, and that it and not Ambase should

bear the cost of contesting the liability were surely ripe as of 1995, if not in 1986.[3] These claims could also have been explicitly framed as breaches of the Trust's obligations under the Assignment Agreement;[4] they are in fact pled implicitly as such now.

Another foundational element of my prior decision was that there was no reason not to hold Ambase to the relevant statute of limitations, even though this case is brought in equity.[5] Because Ambase's injunctive and declaratory relief claims are based on a breach of contract theory and the complaint was not filed until August 2000, I held that the operation of the three year statute of limitations[6] barred its claim unless some basis for equitable tolling of the statute existed.

"Equitable tolling occurs when the plaintiff can show that it was ignorant of the wrong due to the defendant's fraud or fraudulent concealment or some other circumstance justifying why plaintiff did not have reason to know of the facts constituting the alleged wrong."[7] Ambase argued that the statute had been equitably tolled because

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[3] *Keller v. President, Directors & Co. Of Farmers Bank*, Del. Super., 41 Del. 471, 24 A.2d 539, 541 (1942) ("Statutes of Limitation begin to run when proper parties are in existence capable of suing and being sued, and a cause of action exists capable of being sued on forthwith.").

[4] *Nardo v. Guido DeAscanis & Sons, Inc.*, Del. Super., 254 A.2d 254, 256 (1969) (cause of action accrues at time contract is breached).

[5] *See Kahn v. Seaboard Corp.*, Del. Ch., 625 A.2d 269, 277 (1993).

[6] *See* 10 Del. C. § 8106.

[7] *Cincinnati Bell Cellular Systems Co. v. Ameritech Mobile Phone Service of Cincinnati, Inc.*, 1996 Del. Ch. LEXIS 116, *46-47, Del. Ch., C.A. No. 13389, Chandler, V.C. (Sept. 3, 1996) (*citing Kahn*, 625 A.2d at 276).

the Trustee Defendants held offices at both Ambase and the Trust after the Assignment Agreement. Rather oddly, Ambase pled the case as one involving dark motivations, even though the Assignment Agreement itself arises out of the least suspicious of circumstances.[8]

It must be remembered that City was dividing itself in 1985. While the division was obviously structured to be as advantageous as possible to City stockholders, it is paradoxical to think that the City board could structure the division in a way that would be unfair to the City stockholders. After all, those stockholders were the ultimate owners of all of City's assets and liabilities, both before and after the division. City was simply splitting up its own pie.

The fact that the Trustee Defendants thereafter served both as Trustees and as Ambase directors and/or officers thus emerges as benign and to be expected. To buttress its equitable tolling argument, however, Ambase insinuated, without factual support, that the Trustee Defendants had a motive to favor the Trust over Ambase. Therefore, the Trustee Defendants supposedly influenced Ambase to accept liability for the withholding tax liability. But Ambase did not plead or assert facts that suggested that the Trustee Defendants owned a sufficient number of

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[8] In its reargument motion, Ambase continues its odd approach. For example, it argues that it was somehow unseemly for the Trustee Defendants to want the Trust to pay out distributions to the unitholders. Why? Wasn't the Trust created to benefit the City stockholders, all of whom also became Ambase stockholders when the Trust was created? The fact that time has undoubtedly changed the Ambase stockholder base does not erase the fact that the Trust was not conceived in suspicious circumstances.

units in the Trust to make it materially beneficial to them to favor the Trust over Ambase, which was the source of Scharffenberger's and Mantell's livelihood until 1993 and 1996 respectively.

In my oral opinion, I noted how thin Ambase's equitable tolling argument seemed to be. While I did not dilate on the point then, it remains apparent that the argument that the Trustee Defendants fraudulently concealed[9] the basis for Ambase's claims or that the claims were inherently undiscoverable before all of them departed Ambase lacks strength.

As my oral decision noted, Ambase does not plead that the Ambase board was ever comprised of a majority with Trust affiliations. To the contrary, Ambase's counsel admitted at argument that since 1985, Ambase's board has always been comprised of a majority without affiliations with the Trust.

It is not plausible that this Ambase board majority lacked knowledge of the Trustee Defendants' positions with the Trust. If the Ambase board majority blindly relied upon the Trustee Defendants' advice as to which entity was primarily responsible for the disputed tax liability, the board majority did so with knowledge of the Trustee Defendants' affiliations with the Trust – and thus at its own peril. Likewise, the Ambase board surely knew or had

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[9] The complaint does not plead such fraud with particularity nor do Ambase's submissions articulate the supposed fraudulent acts with particularity. It must also be remembered that the basis for Ambase's claims is the Assignment Agreement; those claims are not based on any breach of fiduciary duty allegedly committed by the Trustee Defendants in connection with the execution of the Assignment Agreement.

reason to know that the Trustee Defendants might hold Trust units; after all, all the City stockholders received Ambase shares and Trust units in the division. Therefore, the Ambase board had every reason to seek another opinion on the matter, from sources unconnected to the Trust.

Adding to the weakness of Ambase's equitable tolling argument was the obvious difficulty of concealing claims that Ambase now alleges can be wholly supported by the language of the Assignment Agreement and the IRS Code. While the tax issues are complex and Mantell was obviously an important player on tax matters at Ambase, the withholding tax liability is a large one. Neither the Assignment Agreement nor the IRS Code are secret documents. There is no reason that a diligent Ambase board would not have looked into the issue or sought a view from sources other than the Trustee Defendants.[10] It was simply not a practical impossibility[11] for Ambase to discover a breach of a contract it had in its own possession.

In view of these factors, the notion that the statute of limitations was tolled as to Ambase during the time Trustee Defendants served the company seemed to me to be quite weak. But, in the end, I did not rest my dismissal

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[10] *In re Dean Witter Partnership Litig.*, 1998 Del. Ch. LEXIS 133, *21 Del. Ch., Cons. C.A. No. 14816, Chandler, C. (July 17, 1998) (fraudulent concealment "requires an affirmative act of concealment by a defendant" and even when proven, the statute is only tolled until the plaintiff's claims "could have been discovered by the exercise of reasonable diligence").

[11] *Dean Witter*, 1998 Del. Ch. LEXIS 133, *19 (inherently unknowable exception requires proof that injury's discovery was practically impossible).

decision on a holding that the statute of limitations began to run before the last of the Trustee Defendants had left Ambase.

Instead, I noted the undisputed fact that all of the Trustee defendants had left Ambase's service by December 1996. Thus, any influence the Trustee Defendants had over Ambase was gone as of that point.

Given that the Assignment Agreement was fully available to Ambase, as was the IRS Code, there was no reason why Ambase could not have asserted its claim within three years after Mantell's December 1996 departure.[12] Ambase had full notice of the fact that the Assignment Agreement was the basis for it assuming primary liability for City's withholding tax liability. Ambase thus had the information to decide whether to assert a claim. All its board or management had to do was instruct someone to read the contract and the IRS Code.

Tellingly, Ambase could never identify when the spell cast over its decision-making processes by the Trustee-Defendants would end and the running of the statute of limitations would begin again. Apparently, the claims could have been brought two, five, ten years, or twenty-five years later than they were. How the claims were miraculously discovered in the summer of 2000 given the supposed impossibility of their discovery was not clear.

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[12] *Dean Witter*, 1998 Del. Ch. LEXIS 133, *19-20 (plaintiff invoking equitable tolling doctrines must show that it could not have brought claims if it acted diligently).

Given all these circumstances, I held that Ambase's argument that the statute of limitations was equitably tolled beyond December 1996 to be without merit. Equitable tolling doctrines are an exception to the normal rule, and should not be lightly invoked. When a party has reason and the capacity to assert claims in a timely manner it must do so. When the circumstances that give rise to equitable tolling dissipate, the party which had the benefit of more time is expected to act diligently thereafter.

As Chancellor Chandler has noted:

> [The statute] is tolled only until the plaintiff discovers (or exercising reasonable diligence should have discovered) his injury. Thus, the limitations period begins to run when the plaintiff is objectively aware of the facts giving rise to the wrong, i.e., on inquiry notice.[13]

Consistent with these principles, I held that no later than December 1996 Ambase was on full inquiry notice and possessed all the knowledge it needed to bring its claim.

That reasoning was the primary basis for my dismissal order. In the alternative, I held that the doctrine of laches also barred Ambase's claim. I based that alternative holding on the facts pled in the complaint, and concluded that those facts demonstrated that the requisite elements of laches existed.[14] Ambase had reason to know of its claims for quite a long time, but did not assert them until

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[13] *Dean Witter,* 1998 Del. Ch. LEXIS 133, *23 (emphasis in original).

[14] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.,* Del. Ch., 714 A.2d 96, 104 (1998) (setting forth the test for laches).

August 2000. During the long delay that had transpired since the withholding tax liability first emerged in 1986, the Trust had taken actions in reliance upon the undisputed fact that Ambase had acted as if it was primarily liable for the disputed tax. In particular, the Trust had distributed out assets that could have been used to satisfy the liability. It now has fewer dollars than are needed to satisfy the withholding claim alone, leaving it with no resources to address the other pending claims mentioned in the complaint.

Ambase's course of conduct also prejudiced the Trust in another way. Because payment of the liability could have cut off the running of interest at any time, the Trust could have limited its risk by doing just that. Because Ambase did not raise its claim until the year 2000, the Trust had no earlier chance to do so.

Ambase's Reargument Motion

Ambase's reargument motion is based on a misapprehension of my prior decision. In particular, Ambase claims that I dismissed its claims because Ambase had not convinced me that equitable tolling had stopped the running of the statute of limitations before Mantell's departure in December 1996. It therefore believes that I erred by relying upon contested factual issues regarding the motivations of the Trustee Defendants.

But that was not the linchpin of my statute of limitations decision. I took a far more conservative approach. I held that it was clear that Ambase's claims were ripe as of December 1996, that any influence of the Trustee Defendants was gone as of that time, that Ambase possessed all

the knowledge it needed to file suit within three years of that time, and that it did not do so.

In its reargument motion, Ambase does not quibble with the facts that support my prior decision. Rather, they argue that Ambase was entitled to rely blindly and indefinitely on what the Trustee Defendants had said about which entity bore the withholding tax liability. That is, regardless of the fact that Ambase's claims arise from the face of a contract that it has possessed since 1985 and its reading of the IRS Code, the statute of limitations was forever tolled. I continue to believe that not to be the law, and to disagree with the proposition that claims based on the language of a contract and a code book are inherently undiscoverable by a public company, with a board of directors, officers, employees, and potential derivative plaintiffs to help it sniff out litigable injuries.

Ambase's motion also attaches an array of documentary evidence that Ambase did not file in its papers answering the dismissal motion. This new evidence is not properly raised at this late juncture.

My refusal to consider this evidence does not work any procedural unfairness upon Ambase. Ambase could have submitted this newly asserted evidence in response to the defendants' dismissal motion. Ambase also could have attempted to justify the need for discovery at that time. It did not do so and its arguments in that regard now come too late. Most important, the court's dismissal motion is buttressed by facts that Ambase even now does not dispute.

Finally, Ambase raises a host of other new arguments in its papers, which it did not raise in briefing on the dismissal motion and which are therefore not properly

made on a reargument motion. For example, it spins a new yarn about the substantial motivations that Mantell had to cover up the Trust's possibility liability for the withholding tax liability. The new theory in large part reduces to the assertion that it made little business sense for City to allocate the withholding tax liability to the Trust rather than to Ambase, and that Mantell faced exposure to the Trust for his alleged failure to make sure that the liability was allocated to Ambase in the Assignment Agreement.[15]

Putting aside the many reasons that this theory seems improbable,[16] the theory does not explain the over three and a half year delay that followed Mantell's departure from Ambase. Again, it bears emphasis that the supposed motivations that Mantell harbored to favor the Trust were known by Ambase's other directors and officers since 1985. Ambase's argument thus reduces to its assertion that Mantell had placed some Svengali-like spell on Ambase's board that did not wear off until more than three years after he left.

All of Ambase's other arguments rest on this same foundation. Because the Ambase board chose to rely on Mantell with full knowledge of his Trust affiliations, Ambase contends that it had until the end of the universe

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[15] The reader should remember that it is the defendants' position that the Assignment Agreement did in fact make Ambase primarily liable for the withholding tax liability. Ambase's assertion that assignment of the disputed liability to the Trust was at least counter-intuitive from a business perspective has the unintended effect of supporting defendants' argument on the merits.

[16] The improbability of the theory is well articulated in the defendants' answer to Ambase's reargument motion.

to file this suit. I continue to reject this view that corporations and their directors have no obligation to act in a commercially diligent manner in discovering and asserting claims.

Conclusion

For the foregoing reasons, Ambase's motion for reargument is denied. IT IS SO ORDERED.

Leo E. Strine, Jr.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AMBASE CORPORATION, a Delaware corporation, Plaintiff, v. CITY INVESTING COMPANY LIQUIDATING TRUST, as Successor to CITY INVESTING COMPANY, a dissolved Delaware corporation, and GEORGE T. SCHARFFENBERGER, EBEN W. PYNE and LESTER J. MANTELL, as Trustee of CITY INVESTING COMPANY LIQUIDATING TRUST, Defendants.	)	C.A. No. 18207-NC

ORDER

(Filed Jan. 4, 2001)

WHEREAS, plaintiff filed this case on August 14, 2000, and

WHEREAS, defendants moved to dismiss the Complaint on September 29, 2000, on the grounds that (i) the causes of action alleged in the Complaint are barred by the statute of limitations and (ii) the Complaint fails to state a claim upon which relief may be granted; and

WHEREAS, the Court has considered the briefs and arguments of the parties,

IT IS HEREBY ORDERED this 3rd day of January, 2001, that the Complaint in this action is hereby dismissed with prejudice, solely on the grounds that it is barred by the statute of limitations and the doctrine of laches, as set forth more fully in Court's oral ruling of December 14, 2000, attached hereto as Exhibit A, the Court not having ruled on the merits of the underlying substantive claims.

/s/ Leo E. Strine, Jr.
Vice Chancellor

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June two thousand three.

AMBASE CORPORATION, A Delaware Corporation,

dkt #: 02-7230

Plaintiff-Appellant,

v.

CITY INVESTING COMPANY LIQUIDATING TRUST, as successor to City Investing Company, a dissolved Delaware Corporation, JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, and MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant AmBase Corporation.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: /s/ Arthur Heller
Arthur M. Heller,
Motions Staff Attorney

U.S. Constitution

Article IV

Section 1. Full faith and credit shall be given in each state to the public acts, record, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AMBASE CORPORATION, a Delaware Corporation, Plaintiff, -against- CITY INVESTING COMPANY LIQUIDATING TRUST, as Successor to CITY INVESTING COMPANY, a dissolved Delaware corporation, and GEORGE T. SCHARFFENBERGER, FEBEN W. PYNE and LESTER J. MANTELL, Individually and as Trustees of the CITY INVESTING COMPANY LIQUIDATING TRUST, Defendants.	01 Civ. 0771 (LLS)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Introduction

In its most recent brief (its fourth on the subject),[1] AmBase Corporation ("AmBase") misrepresents City Investing Company Liquidating Trust's (the "Trust")

[1] AmBase's first brief on this subject was filed on November 15, 2000 in opposition to the Trust's motion to dismiss the Delaware action. AmBase again raised the same issues in its motion for reargument in Delaware, filed January 10, 2001. AmBase next raised these issues on March 9, 2001, in its brief in response to the Trust's motion to dismiss this case. AmBase's latest brief was filed on November 26, 2001.

position, the law of Delaware, Vice-Chancellor Strine's opinion, the law of New York, an Administration Agreement which does not even mention AmBase's assumption of the

* * *

ARGUMENT

I. THE FACTUAL AND LEGAL FINDINGS OF THE DELAWARE COURT ARE ENTITLED TO PRECLUSIVE EFFECT IN THIS COURT.

The main point of AmBase's latest brief is that Vice-Chancellor Strine's findings are not entitled to preclusive effect under Delaware (and, therefore, New York) law because the Delaware case was dismissed on statute of limitations grounds and not "on the merits". AmBase's argument misstates the Trust's legal position, conflates the two separate and distinct doctrines of res judicata (or claim preclusion) and collateral estoppel (or issue preclusion), and misrepresents Delaware law.

The Trust has never raised res judicata, or claim preclusion, as a basis for dismissal of this case. Instead, the Trust has consistently maintained that the findings which the Vice Chancellor made in his ruling should be given issue preclusive effect.

"Collateral estoppel and res judicata are related but distinct doctrines that may bar a party from litigating certain issues or claims in a subsequent proceeding." Epperson v. Entm't Express, Inc., 242 F.3d 100, 108 (2d Cir. 2001). Under the doctrine of res judicata, or claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating

issues that were or could have been raised in that action." Leather v. Ten Ryck, 180 F.3d 420, 424 (2d Cir. 1999). In contrast, collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised and decided against that party . . . whether or not the tribunals or causes of action are the same." Id. at 425.

Claim preclusion is ordinarily created by a judgment on the merits. However, it is black-letter law that a question of fact actually litigated and resolved in a prior proceeding is entitled to collateral estoppel effect – even if the prior case is dismissed on statute of limitations grounds. The Delaware Supreme Court has explicitly recognized the difference between res judicata and collateral estoppel, and has given preclusive effect to findings of fact even though the previous court did not adjudicate plaintiff's claims on the merits. See Stephenson v. Capano Dev., Inc., 462 A.2d 1069, 1073 (Del. 1983); Winkler v. Balentine, 254 A.2d 849, 851 (Del. 1969).

AmBase mistakenly claims that the Delaware cases it cites, Cappello v. Patrician Towers, Inc., No. 102, 1981 Del. LEXIS 272 (Del. Jan. 14, 1981) and Equity Corporation v. Groves, 53 A.2d 505 (Del. Ch. 1947), stand for the proposition that Delaware courts do not give issue preclusive effect to judicial findings of previously litigated facts if the prior case was dismissed on statute of limitations grounds. (AmBase Br. at 17). In fact, the Cappello case dealt only with claim preclusion, and not with collateral estoppel. The court in Cappello held "that a judgment based on the forum's statute of limitations is not a ruling on the merits and is not, therefore, entitled to res judicata effect in a later action in another jurisdiction." Cappello, 1981 Del. LEXIS 1980, at *2-3 (emphasis added). By

cutting off its quote of the court's opinion to eliminate the words "res judicata" and inserting its own phrase: "any preclusive effect", AmBase misrepresents the holding of the case.

In Cappello, the plaintiff had previously brought identical claims in Virginia, which were dismissed because they were not brought within Virginia's three-year statute of limitations. The Cappello court unsurprisingly held that the prior ruling that the claims were time-barred under Virginia law did not have the res judicata effect of determining that those claims were time-barred under Delaware law. The court made clear, however, that its ruling was only that the Delaware trial court should not have accorded res judicata effect "to that aspect of the Virginia judgment." Cappello, 1981 Del. LEXIS, at *3.

Neither Cappello nor Equity Corp. in any way suggested that previously-litigated questions of fact or law actually adjudicated by the prior tribunal were not entitled to collateral estoppel effect.

The Trust has never argued that res judicata bars AmBase from bringing a claim in New York because that claim was previously dismissed in Delaware on statute of limitations grounds. The Trust's position is only that the Delaware court's factual findings are entitled to issue preclusive effect in this Court. Applying New York law to those previously adjudicated facts requires the dismissal of AmBase's claims because they are time-barred under New York law.

Vice Chancellor Strine made at least four findings that are entitled to preclusive effect: (1) AmBase's claims against the Trust accrued in 1986 (Strine Op. 8-9; Strine Oral Op. 4); (2) AmBase was on full inquiry notice of the

existence of these claims no later than December 1996 (Strine Op. 14-16; Strine Oral Op. 5); (3) AmBase's alleged reliance on the Trustee defendants in connection with the Income Tax Liability was unreasonable as a matter of law, and could not support equitable tolling of the statute of limitations (Strine Op. 10-14; Strine Oral Op. 4-5); and (4) AmBase's claims are barred by the doctrine of laches (Strine Op. 16-17; Strine Oral Op. 6-7).

New York law clearly grants preclusive effect to factual determinations even when "the issue precluded was the subject of only an alternative determination by the trial court." Malloy v. Trombley, 50 N.Y.2d 46, 52, 405 N.E.2d 213, 216 (1980). Seeking to avoid the thrust of these cases, AmBase makes the untenable claim that Malloy does not apply "where the preclusive effect of the prior proceeding is determined pursuant to Delaware law." (AmBase Br. at 23) AmBase's baseless claim that the "alternative determination" doctrine is applicable only where the previous adjudication applied New York law finds no support in principle or precedent. AmBase also derides The Trust's "unique and creative application of New York's 'alternative determination' theory to the collateral estoppel doctrine." (AmBase Br. at 22). In fact, the New York doctrine of "alternative determinations" is clearly applicable to collateral estoppel cases. See Malloy v. Trombley, 50 N.Y.2d 46, 52, 405 N.E.2d 213, 216 (1980); Aldrich v. State, 110 A.D.2d 331, 332, 494 N.Y.S.2d 662, 663 (1985).

Finally, AmBase's counsel have not argued that standards under New York law differ from standards under Delaware law in any way which would undermine Vice-Chancellor Strine's findings, nor could they. Vice-Chancellor Strine's findings that AmBase's claims accrued

as early as 1986, that AmBase was on full inquiry notice of its claims not later than December 1996, that AmBase's alleged reliance on the trustees was unreasonable, and that AmBase's claims are barred by laches could have as easily been found by a Justice of the New York State Supreme Court, or this Court.

* * *

United States Court of Appeals
For the Second Circuit

August Term, 2002

(Argued: November 7, 2002 Decided: April 3, 2003)

Docket No. 02-7230

AMBASE CORPORATION, A Delaware Corporation,

Plaintiff-Appellant,

-v.-

CITY INVESTING COMPANY LIQUIDATING TRUST, as successor to City Investing Company, a dissolved Delaware Corporation, JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, and MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust,

Defendants-Appellees.

Before: WALKER, Chief Judge, and OAKES and MINER, Circuit Judges.

Appeal from judgment entered in the United States District Court for the Southern District of New York (Stanton, J.), dismissing on the pleadings plaintiff-appellant's action for indemnification of legal expenses and denying plaintiff-appellant leave to amend its complaint upon finding that both the causes of action pleaded in the original complaint and those pleaded in the proposed amended complaint were either time barred under

New York's statute of limitations or failed to state claims upon which relief could be granted.

Affirmed.

* * *

DISCUSSION

I. Standard of Review

A complaint should not be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). A court's task "in ruling on a Rule 12(b)(6) motion 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" Cooper, 140 F.3d at 440 (quoting Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d Cir. 1984)). Furthermore, a court must "accept as true all factual allegations in the complaint." Cooper, 140 F.3d at 440. Finally, "we are entitled to affirm . . . on any ground for which there is support in the record, even if not adopted" by the District Court. Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582, 305 F.3d 82, 88 (2d Cir. 2002). In particular, we can affirm the dismissal of a complaint for failure to state a claim based on the affirmative defense of res judicata if "all relevant facts are shown by the court's own records," of which we can take judicial notice. Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992).

II. Res Judicata

Where there is a final state court judgment, a federal court looks to that state's rules of res judicata to determine the preclusive effect of that judgment. Town of Deerfield, N.Y. v. FCC, 992 F.2d 420, 429 (2d Cir. 1993) (citing 28 U.S.C. § 1738). Thus, to determine the preclusive effect of the judgment in the Delaware Action, we must look to the Delaware courts' rules of res judicata. In Delaware, a claim is barred by res judicata if: (1) the court that adjudicated the prior action had jurisdiction to do so; (2) the parties to the subsequent action are the same as (or privies to those in) the prior action; (3) the causes of action in both cases are the same or the subsequent action arises from the same transaction that formed the basis of the prior action; (4) the merits in the prior action were decided adversely to the contentions of the plaintiff; and (5) the prior action was final. Maldonado v. Flynn, 417 A.2d 378, 381 (Del. Ch. 1980). Here, four of these five elements need not detain us long. The Chancery Court plainly had subject matter and personal jurisdiction to adjudicate the Delaware Action. The parties to the Delaware Action were the same as the parties to the case at bar. The dismissal of the Delaware Action was adverse to AmBase and was a dismissal on the merits. See Loving v. Pirelli Cable Corp., 11 F. Supp. 2d 480, 491-92 (D. Del. 1998) (dismissal of action by a Delaware court as time barred by the Delaware statute of limitations is a dismissal on the merits for res judicata purposes), aff'd mem., 178 F.3d 1279 (3d Cir. 1999); Williamson v. Columbia Gas & Elec. Corp., 91 F. Supp. 874, 880 (D. Del.) (same), aff'd, 186 F.2d 464 (3d

Cir. 1950). Finally, the judgment dismissing AmBase's claims in the Delaware Action was final.[9]

The only element to which we must devote further attention concerns whether the causes of action were the same in both cases or whether the instant action arises from the same transaction that formed the basis of the Delaware Action. This "transactional view" of claim preclusion was succinctly explained by the Delaware Chancery Court in Maldonado:

In earlier times the doctrine of res judicata could be invoked only to bar the

* * *

[9] Although on March 8, 2001, AmBase appealed the Chancery Court's decision to the Delaware Supreme Court, AmBase voluntarily dismissed its appeal two weeks later, see AmBase Corp. v. City Inv. Co. Liquidating Trust, No. 106, 2001 (Del.) (Docket Entry Nos. 4-6).

(2)

No. 03-394

Supreme Court, U.S.
FILED
OCT 15 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMBASE CORPORATION,
A Delaware Corporation,

Petitioner,

v.

CITY INVESTING COMPANY LIQUIDATING TRUST, as successor to City Investing Company, a dissolved Delaware Corporation, JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, and LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October 15, 2003

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Respondents City Investing Company Liquidating Trust, John J. Quirk, Marion Scharffenberger, Eben W. Pyne and Lester J. Mantell respectfully request that this Court deny AmBase Corporation's petition for a writ of *certiorari* because the opinion of the Court of Appeals for the Second Circuit below, *see* Petitioner's Appendix ("Pet. App.") at 1a – 24a, raises no issue worthy of review by this Court.

PERTINENT STATUTORY PROVISIONS

Section 202 of the New York Civil Practice Law and Rules (2003) provides that:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

COUNTERSTATEMENT OF THE CASE

This case arises out of a much-belated attempt by petitioner AmBase Corporation ("AmBase") to avoid its contractual obligation to pay (or defend against) certain alleged income tax liabilities of City Investing Company ("City") (the "Income Tax Obligation"), which AmBase had been defending against since 1986. In connection with City's liquidation in 1985, City entered into an Assignment and Assumption Agreement (the "Assignment Agreement") with its then-subsidiary AmBase pursuant to which City paid AmBase $178,767,000 to assume liability for City's income tax obligations and certain other obligations. The Income Tax Obligation arose from an I.R.S. Revenue Agent's Report delivered to AmBase in 1986. For well over a decade, AmBase acted as though it was solely responsible for the

Income Tax Obligation. It was not until the year 2000—some 14 years later—that AmBase first asserted that it had not in fact assumed City's Income Tax Obligation when it agreed to the 1985 Assignment Agreement.

In seeking to avoid its liability for City's Income Tax Obligation, AmBase first filed suit against City Investing Company Liquidating Trust ("City Trust" or the "Trust") in the Delaware Chancery Court in August 2000. On December 14, 2000, Vice Chancellor Leo E. Strine dismissed all of AmBase's claims as barred by the Delaware statute of limitations and the doctrine of laches. Respondents' Appendix ("Resp. App.") at A-4 – A-5. Vice Chancellor Strine subsequently denied AmBase's petition for reconsideration in a blistering opinion dated February 7, 2001. *See* Pet. App. at 38a – 54a.

The Delaware Chancery Court found that AmBase "could have brought this action against the Trust as early as 1986", because that was when AmBase began to incur costs in defending against the I.R.S. assertion of the Income Tax Obligation. Pet. App. at 43a – 44a. The Chancellor also rejected all of AmBase's arguments to toll the running of the statute of limitations, noting "how thin AmBase's equitable tolling argument seemed to be". Pet. App. at 47a. The Court found that all AmBase had to do to ascertain any claim it might have had in 1986 was to review the Assignment Agreement and the Internal Revenue Code, that "[n]either the Assignment Agreement nor the I.R.S. Code are secret documents" and that had there been any doubt as to its obligations, any "diligent" board would have conducted a timely, independent inquiry into AmBase's responsibility to pay the Income Tax Obligation. Pet. App. at 48a.

Chancellor Strine also rejected AmBase's attempt to excuse its delay by making unsupported accusations against certain AmBase directors and employees who had also been

Trustees of City Trust. Chancellor Strine found that these directors, who had served as directors of City and AmBase before the liquidation, came to serve on the AmBase Board under "the least suspicious of circumstances", had no financial incentive to favor the Trust over AmBase and at no point in time controlled AmBase. Pet. App. at 46a – 47a. The Chancellor also found that the two AmBase directors who were Trustees of City Trust left the AmBase Board seven-and-a-half years before the Delaware suit was filed, while another Trustee who had served as an AmBase employee and consultant left AmBase three-and-a-half years before the suit was filed. Pet. App. at 40a. Because AmBase's claims had accrued in 1986, because the relevant Delaware periods of limitation were not longer than three years and because all AmBase officers and directors who had any affiliation with City Trust had left AmBase more than three years before the suit was filed, the Delaware Chancery Court dismissed all of AmBase's claims under Delaware's statute of limitations and the Delaware doctrine of laches. Pet. App. at 50a – 51a.

AmBase then appealed Chancellor Strine's dismissal Order to the Delaware Supreme Court and simultaneously filed this action in the United States District Court for the Southern District of New York on January 30, 2001, where it was assigned to the Hon. Louis L. Stanton. City Trust filed no answer in the New York litigation. On February 23, 2001, City Trust filed a motion to dismiss under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12, arguing that AmBase's claims were barred by the statute of limitations and the doctrine of laches and that AmBase was precluded by Chancellor Strine's opinion in Delaware. Confronted with a motion to dismiss, AmBase withdrew its Delaware appeal, changed its New York counsel mid-stream and filed two separate waves of briefs opposing City Trust's motion to dismiss in the District Court.

City Trust's motion to dismiss AmBase's New York action sought its dismissal "on the grounds of the statute of limitations and laches". Resp. App. at A-7. City Trust's brief relied heavily on Chancellor Strine's decision in Delaware. In the second sentence of the brief, City Trust stated: "*This action has already been dismissed on those grounds by the Delaware Chancery Court.*" Resp. App. at A-7 (emphasis added). City Trust relied on Chancellor Strine's opinion throughout its brief and argued that AmBase was precluded from relitigating the matters decided by Chancellor Strine. *See* Resp. App. at A-9 – A-10; A-13 – A-19. Both City Trust and AmBase consistently regarded all Delaware law issues as resolved by Chancellor Strine's opinion and addressed their arguments to the New York statute of limitations. At no point in the courts below did AmBase ever suggest that the Delaware Chancery decision had not conclusively determined the Delaware law issues. Assuming that the Delaware law issues had been conclusively determined by Chancellor Strine's decision, City Trust focused its argument in the District Court on the New York law issues; the Trust argued that AmBase's causes of action accrued not later than 1986 when AmBase began to incur expenses in defending against the I.R.S. assertion of the Income Tax Obligation and that AmBase was collaterally estopped from challenging that view by Chancellor Strine's findings. *See* Resp. App. at A-10 ("Because Chancellor Strine found that . . . AmBase could have brought this action as early as 1986, AmBase is bound by that accrual decision and estopped from relitigating that issue here.").

City Trust countered AmBase's anticipated tolling argument by arguing that AmBase could not plead reasonable diligence because "AmBase . . . is estopped by Chancellor Strine's findings". Resp. App. at A-16. City Trust also argued that any AmBase claim of tolling would be subject to the two-year period of limitations imposed by New York C.P.L.R. 203(g) and that AmBase was collaterally estopped

from claiming any equitable tolling beyond December 1996 by Chancellor Strine's findings that "no later than December 1996 AmBase was on full inquiry notice". Resp. App. at A-17.

Contrary to its arguments to this Court, AmBase was well aware of City Trust's reliance on the preclusive effects of Chancellor Strine's decision throughout the proceedings below. In its brief in opposition to City Trust's motion to dismiss in the District Court, AmBase stated: "Principally, the Defendant [City Trust] argues that AmBase is precluded from bringing the instant action by a recent decision by the Delaware Chancery Court dismissing a similar action brought by AmBase . . . ." Resp. App. at A-22. And again: "The Defendant [City Trust] . . . even goes so far as to assert that [the Delaware decision] *precludes* this Court from allowing this action to proceed." Resp. App. at A-25 (emphasis in original).

In AmBase's supplemental opposition brief filed in the District Court, AmBase argued that "[t]he decision of the Delaware Chancery Court has no preclusive effect". Resp. App. at A-29. In support of that argument, AmBase argued that because the Delaware Chancellor's statute of limitations ruling is "not a ruling on the merits", it should not be given preclusive effect. Resp. App. at A-30. In arguing that "this Court should not give any preclusive effect to the *findings* of the Delaware Court", AmBase admits that the issue being addressed by AmBase and City Trust in the District Court was the preclusive effect of the Chancellor's *findings of fact*, in the context of City Trust's argument based on the New York statute of limitations, not the res judicata effect of the Delaware decision. Resp. App. at A-32 (emphasis added).

It was in that context that City Trust distinguished between the collateral estoppel and res judicata aspects of

Chancellor Strine's decision, arguing that AmBase's "on the merits" assertions were irrelevant to City Trust's collateral estoppel arguments, and pointing out that City Trust's collateral estoppel argument was not a res judicata argument. At no time during the course of its many arguments in the District and Circuit Courts did AmBase ever question the proposition that the Delaware Chancellor's opinion had conclusively determined that AmBase's claims were time-barred under the Delaware statute of limitations and preclusive as to that question. At no time did City Trust give any indication that it was abandoning its reliance on the Delaware decision as preclusive of relitigation of any Delaware law limitations issue.

Judge Stanton decided to base the District Court's dismissal of AmBase's claims on the New York statutes of limitation and on his own review of the pleadings. *See* Pet. App. at 25a – 37a. Like Chancellor Strine, Judge Stanton decided that AmBase's causes of action accrued in 1986 and that any equitable estoppel argument AmBase might have had expired in December 1996, by which time the one AmBase employee and two AmBase directors who had any City Trust affiliation had left AmBase. Pet. App. at 32a – 34a. Judge Stanton decided that all but one of AmBase's claims were barred by C.P.L.R. §§ 213(2) and (7), the relevant New York statutes of limitation, and that AmBase's remaining claim of indemnification was unsupported by the terms of the Assignment Agreement and therefore failed to state a cause of action. Pet. App. at 31a – 37a. (The Delaware Chancery Court had dismissed AmBase's indemnification argument for the same reason. *See* Resp. App. at A-2 – A-3.) Judge Stanton found that any equitable tolling claim AmBase might have had expired in December 1996, and held that C.P.L.R. 203(g) required AmBase to file within two years of that date, or by December 1998. Pet. App. at 32a – 34a. Since AmBase had not sued until January 30, 2001, Judge Stanton dismissed AmBase's

New York lawsuit as time-barred by the New York statute of limitations. Pet. App. at 32a – 34a. AmBase then filed a motion for reconsideration which Judge Stanton denied on February 14, 2002. *See* Pet. App. at 17a.

AmBase once again changed its counsel and appealed to the United States Court of Appeals, arguing that Judge Stanton had misconstrued New York law in dismissing AmBase's Complaint as time-barred. Once again, AmBase recognized that City Trust was relying on the "preclusive effect" of "the decision of the Delaware Court". Resp. App. at A-43. AmBase's appeal brief was largely devoted to the specious argument (not made by AmBase's counsel in the District Court) that AmBase's fiduciary duty claims did not accrue under the applicable New York statute of limitations (C.P.L.R. § 213(7)) until all AmBase employees who had any relationship with City Trust had left AmBase's employ, *see* Resp. App. at A-49 – A-51, despite clear authority holding that AmBase's newly-invented tolling argument was inapplicable to claims of breach of fiduciary duty by corporate officers and directors. *See, e.g., Whitney Holdings Ltd. v. Givotovsky*, 988 F.Supp. 732, 741-45 (S.D.N.Y. 1997); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 744-45 (2d Cir. 1979). The balance of AmBase's argument was devoted to the equally baseless argument that its time-barred contract-based claims were resurrected every time AmBase incurred any additional expense alleged to arise from City Trust's alleged 1986 breach of contract, *see* Resp. App. at A-44 – A-49, despite a plethora of authority holding that all of AmBase's claims under any conceivably applicable theory of law accrued in 1986. *See, e.g., Whitney*, 988 F.Supp. at 743; *Selkirk v. State*, 671 N.Y.S.2d 824, 825 (App. Div. 1998); *Lowell Wiper Supply Co. v. Helen Shop, Inc.*, 235 F. Supp. 640, 644 (S.D.N.Y. 1964). Conspicuously absent from AmBase's Court of Appeals brief was any suggestion that the Delaware Chancery decision did not

conclusively determine the time-barred status of AmBase's claims under the Delaware law of limitations.

Under § 202 of the New York C.P.L.R. (2003), the courts of the state of New York are instructed that:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

In other words, if a non-resident sues in New York, the state courts will apply the shorter of the New York period of limitations or that of the state where the cause of action accrued. AmBase is a Delaware corporation and had no office in New York at any relevant time. AmBase is, therefore, a non-resident of New York. Under New York law, a cause of action alleging economic loss accrues in a corporation's state of incorporation. *See, e.g., Global Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 485 (N.Y. 1999) (action accrues in state of residence); *Am. Lumbermens Mut. Cas. Co. of Ill. v. Cochrane*, 129 N.Y.S.2d 489, 491 (Sup. Ct. 1954) (corporation is resident of state of incorporation), *aff'd*, 134 N.Y.S.2d 473 (App. Div. 1954), *aff'd*, 133 N.E.2d 461 (N.Y. 1956); *but see Official Comm. of Asbestos Claimants of G.I. Holding, Inc. v. Heyman*, 277 B.R. 20, 30 (S.D.N.Y. 2002). In this case, that means a New York state court would apply the shorter of the periods of limitation of New York or Delaware. Because Delaware's relevant period of limitations is three years, *see* Del. Code Ann. tit. 10, § 8106 (2003), and New York's is six years, *see* C.P.L.R. § 213 (2003), New York C.P.L.R. § 202 would mandate the application of Delaware law to this case.

The Court of Appeals decided to affirm Judge Stanton's dismissal of AmBase's action on grounds other than those relied on by Judge Stanton, as it was clearly entitled to do. *See, e.g., Thigpen v. Roberts*, 468 U.S. 27, 28 (1984); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977); *MFS Sec. Corp. v. N.Y. Stock Exch., Inc.*, 277 F.3d 613, 617 (2d Cir. 2002) (citing *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997)). The Court took as its point of departure the cases of *Loving v. Pirelli Cable Corp.*, 11 F.Supp.2d 480 (D.Del. 1998), *aff'd*, 178 F.3d 1279 (3d Cir. 1999), and *Williamson v. Columbia Gas and Elec. Corp.*, 91 F.Supp. 874 (D.Del. 1950), *aff'd*, 186 F.2d 464 (3d Cir. 1950). Both *Loving* and *Williamson* involved the question of whether a decision that the plaintiff's lawsuit was barred by the Delaware statute of limitations precluded the plaintiff from relitigating that issue in a subsequent lawsuit. Not surprisingly, both courts reached the conclusion that relitigation of the Delaware limitations issue was barred by res judicata. The Delaware Supreme Court reached the same result as to Delaware's statute of limitations in *Townsend v. Chasanov*, No. 129, 1995 Del. LEXIS 367 (Oct. 11, 1995):

> "It is well settled that a plaintiff who receives a decision on the merits of a controversy from a court of competent jurisdiction is precluded thereafter by the doctrine of res judicata from bringing a subsequent action in another court based upon the same matter. . . . We therefore agree with the Superior Court's holding that Townsend's later lawsuit was barred by the doctrine of res judicata." 1995 Del. LEXIS 367, at * 2 – * 3.

Following these cases, the Second Circuit applied Delaware law to AmBase's New York action and held that AmBase was precluded from relitigating whether its claims were time-barred by Delaware law. Since Delaware law is applicable to AmBase's claims under § 202 of the C.P.L.R. (because AmBase was not a resident of New York, because AmBase's

breach of contract claims accrued in Delaware and because Delaware's relevant statute of limitations is shorter), the Second Circuit's decision holding that AmBase is barred from relitigating the Delaware statute of limitations issue by the preclusive effect of Chancellor Strine's decision is clearly correct. Since C.P.L.R. § 202 mandates the application of either the law of Delaware or the law of New York and since Judge Stanton held that AmBase's claims were time-barred under the New York statute of limitations, the result in this case would be the same even if Delaware law did not apply—dismissal of AmBase's lawsuit as time-barred.

SUMMARY OF THE ARGUMENT

Petitioner AmBase comes to this Court after: (1) the Delaware Chancery Court (Hon. Leo E. Strine, Jr.) dismissed its Delaware action because AmBase's claims against City Trust are barred by the Delaware statute of limitations and the doctrine of laches; (2) the United States District Court for the Southern District of New York (Hon. Louis L. Stanton) dismissed AmBase's New York action because its claims are barred by the New York statute of limitations; and (3) the United States Court of Appeals for the Second Circuit correctly decided that Delaware law applied, accorded res judicata effect to the decision of the Delaware Court and affirmed the dismissal of AmBase's New York action.

In cases brought by non-resident plaintiffs, the courts of the State of New York apply the shorter of the statute of limitations of New York or the statute of the state in which the cause of action accrued, under C.P.L.R. § 202.[1] Since

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[1] C.P.L.R. § 202: "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued

AmBase is a Delaware corporation that had no place of business in New York at any relevant time, and AmBase's causes of action for economic loss accrued in its state of incorporation, Delaware, New York courts would apply the statute of limitations of either New York or Delaware. *See, e.g.*, *Triarc Corp.*, 715 N.E.2d at 485; *Cochrane*, 129 N.Y.S.2d at 491. AmBase has never argued that the statute of any other state should apply. Since the relevant Delaware period of limitations is three years, while the New York period is six years, New York courts would apply Delaware law to this case.

This is exactly what the Court of Appeals did in applying Delaware law and according preclusive effect to the Delaware Chancery decision dismissing AmBase's action under Delaware's statute of limitations. Even if the Second Circuit somehow erred in applying Delaware law, it would make no difference to the outcome of this case because AmBase's action would then be governed by New York law and Judge Stanton, sitting in the Southern District of New York, applied New York law and correctly found that AmBase's action was barred by the New York statute of limitations. AmBase's complaint has thus been dismissed as time-barred under the laws of both states whose laws could be applicable to this case under C.P.L.R. § 202. Should AmBase now wish to claim that the law of some third state should apply to the timeliness of its claims, the short answer is that AmBase has never before made such a claim and is, therefore, barred from raising that issue now. All of which raises the question why this case is now before the Supreme Court of the United States.

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in favor of a resident of the state the time limited by the laws of the state shall apply."

AmBase claims that we are here because the Second Circuit's reliance on the res judicata principle was barred by Fed. R. Civ. P. 8(c), which requires that a defendant's answer plead any available defense of res judicata, and because the Circuit Courts are in conflict over the consequences of a defendant's failure to so plead. AmBase is wrong.

City Trust never filed an answer in this case. Rule 8(c), which is limited to the "pleadings" enumerated in Fed. R. Civ. P. 7(a), is therefore inapplicable. City Trust filed a motion under Fed. R. Civ. P. 12, which is not a "pleading", seeking dismissal of AmBase's action because it was time-barred. Rule 12 does not require that the moving party join an available res judicata motion when it moves to dismiss on other Rule 12 grounds. To the contrary, Rule 12(h)(1) only requires a party who makes a Rule 12 motion to move on all available personal jurisdiction, venue, process and service of process grounds, on pain of waiver. Rules 12(g) and 12(h)(2) expressly provide that the defense of failure to state a claim under Rule 12(b)(6), pursuant to which res judicata and statute of limitations defenses are customarily made, is not waived and may be made even during the trial on the merits. The express language of Rule 12 therefore leaves no room for any argument that the omission of an available res judicata or statute of limitations defense from a Rule 12 motion operates as a waiver of that defense.

AmBase also claims that City Trust decided for some mysterious reason to surrender its right to rely on the res judicata effect of the judgment that the Trust had earlier secured from the Delaware Chancery Court at considerable effort and expense. City Trust did no such thing.

AmBase knew from the outset of the New York litigation that City Trust sought to rely on whatever preclusive effect the Trust could derive from the Delaware decision. As AmBase admitted in its brief in opposition to

the Trust's motion to dismiss in the Southern District of New York: "The Defendant [City Trust] . . . even goes so far as to assert that [the Delaware Chancery Opinion] *precludes* this Court from allowing this action to proceed." *See* Resp. App. at A-25 (emphasis in original). Indeed, City Trust built its entire motion to dismiss in the District Court around the preclusive effect of Chancellor Strine's Delaware Chancery Opinion.

AmBase's argument before this Court is based on its distortion of City Trust's response to AmBase's argument below that the Trust could not rely on the preclusive effect of factual findings made by the Delaware Chancellor, in the context of an argument based on the New York statute of limitations. AmBase argued that the Delaware statute of limitations decision was not a decision "on the merits" and so did not qualify for res judicata treatment. The Trust responded, in the context of its argument based on the New York statute of limitations, that it was asserting that AmBase was barred from relitigating certain factual determinations by principles of collateral estoppel. It was in that limited context that City Trust stated it was not relying on a res judicata argument. By ignoring the limited nature of the Trust's res judicata comments and their limiting context, AmBase misleadingly distorts the meaning of the Trust's collateral estoppel argument. To suggest that an argument made by City Trust in support of its right to make preclusive use of the Delaware decision for collateral estoppel purposes manifested its intention to abandon reliance on the res judicata implications of that decision is nothing short of bizarre.

AmBase attempts to transform its attack on the Second Circuit's Delaware law decision into a denial by the Second Circuit of full faith and credit. Whatever else may be said of the Second Circuit's decision, it is not a denial of full faith and credit. To the contrary, the Second Circuit did its best to

determine and apply Delaware law and its efforts to do so, whether right or wrong, cannot constitute a denial of full faith and credit. *See Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining and Milling Co.*, 243 U.S. 93, 96 (1917) (Holmes, J.).

The Second Circuit simply applied Delaware law to AmBase's New York action and held that the Delaware Chancery decision barred AmBase from relitigating whether AmBase's claims were barred by the Delaware statute of limitations. Both of these decisions are unquestionably correct. Under C.P.L.R. § 202, the Delaware statute of limitations applies to this case. And under widely-accepted principles of res judicata and collateral estoppel, the Delaware Chancery Court decision precludes AmBase from relitigating the Delaware limitations issue in the Southern District of New York.

AmBase cites no case law or other authority which in any way supports its argument that it should be permitted to relitigate the time-barred status of its claims under Delaware law. Nor does AmBase suggest any reason that it should be permitted to do so.

Although AmBase argues that it has been deprived of due process, AmBase invokes no applicable exception to the well-established law which empowers a Circuit Court to affirm a District Court decision on any ground supported by the record. *See, e.g., Thigpen*, 468 U.S. at 28; *New York Tel. Co.*, 434 U.S. at 166 n.8; *MFS Sec. Corp.*, 277 F.3d at 617; *Shumway*, 118 F.3d at 63. AmBase's only arguments in support of its due process claim are based on Fed. R. Civ. P. 8(c), which does not apply to this case, and on an alleged waiver which never took place.

Nor did the process of the Second Circuit deprive AmBase of any meaningful right. AmBase was granted ample opportunity to argue that its claims were not barred by

the Delaware statute of limitations in the Delaware Chancery Court. In this case, District Judge Stanton gave AmBase a generous opportunity to argue that its rights were not barred by New York law, to the point of allowing a supplemental wave of briefing when AmBase changed its legal horses mid-stream and proceeding to address the issue a third time on AmBase's petition for reconsideration. After due consideration by the Delaware Chancery Court and the District Court below, AmBase's lawsuit was dismissed by both of those courts as time-barred by the statutes of limitation of Delaware and New York. Since the only laws applicable to AmBase's claims under C.P.L.R. § 202 are those of Delaware or those of New York, AmBase has surely had all of the process which it is due.

REASONS FOR DENYING AMBASE'S PETITION FOR A WRIT OF CERTIORARI

I. RULE 8(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT APPLY TO THIS CASE.

The principal reasons AmBase advances for granting *certiorari* in this case are that the Second Circuit supposedly transgressed Fed. R. Civ. P. 8(c) in affirming the dismissal of AmBase's New York action and that the Circuit Courts of Appeal are conflicted over whether a Court of Appeals may consider on appeal an issue that a party has waived under Rule 8(c). The short answer is that Rule 8(c) does not apply to this case because City Trust did not file an answer. Rule 8(c) requires a defendant who files an answer to plead certain enumerated defenses, including res judicata. Rule 8(c) is applicable only to "pleadings". Fed. R. Civ. P. 7(a), which defines that term, refers only to complaints, answers, answers to crossclaims, replies to counterclaims and third party complaints and answers. Rule 7(a) does not include Rule 12 motions in its definition of "pleadings". *See, e.g., Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l*

Planning Agency, 216 F.3d 764, 788 (9th Cir. 2000) ("A motion to dismiss is not a pleading."); *Maldonado v. Dominguez*, 137 F.3d 1, 11 n.8 (1st Cir. 1998) (same); *Miles v. Dep't of the Army*, 881 F.2d 777, 781 (9th Cir. 1998) (same).

City Trust filed a motion to dismiss under Rule 12 seeking dismissal of AmBase's New York action on statute of limitations and laches grounds. Rule 12(h)(1) provides that a party making a Rule 12 motion waives any available personal jurisdiction, improper venue, insufficiency of process or insufficiency of service of process defense that it does not raise in that motion. Rule 12 does not provide that the omission of an available res judicata ground for dismissal from a Rule 12 motion constitutes a waiver of the res judicata defense. The fact that Rule 12(h)(1) enumerates the specific defenses that are waived if not raised in a Rule 12 motion and that res judicata and statute of limitations defenses are not among them leaves no room for any argument that an omitted res judicata ground for dismissal is waived under Rule 12, particularly given the long-standing federal policy against imposing waivers of substantive right upon litigants under uncertain or ambiguous circumstances. As AmBase concedes in its petition, "waiver is the '*intentional* relinquishment or abandonment of a known right'". *See* Petition for Writ of Certiorari, dated September 10, 2003 ("Pet."), at 19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (emphasis added); *see also D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185-86 (1972); *Kirkland & Ellis v. CMI Corp.*, No. 95 C 7457, 1999 WL 92257, at * 12 (N.D. Ill. Feb. 11, 1999).

Rule 12(g) provides that if a party makes a Rule 12 motion and omits available Rule 12 defenses from the motion, that party may not make a second Rule 12 motion, subject to certain exceptions. Under Rule 12(g), the only consequence of omitting an available defense is the inability

to file a second Rule 12 motion—not waiver of the defense. Even more importantly, Rule 12(g) excepts motions covered by Rule 12(h)(2) from its ambit. Rule 12(h)(2) provides that the defense of failure to state a claim under Rule 12(b)(6) may be made in any pleading permitted or ordered under Rule 7, by a motion on the pleadings or even *at the trial on the merits*. Since defenses based on res judicata or statutes of limitation are customarily asserted as Rule 12(b)(6) defenses, Rules 12(g) and 12(h)(2) make it clear that any such defense is not waived by omission from a Rule 12 motion.

Indeed, the Advisory Committee Notes to the 1966 Revision of Rule 12 expressly state that Rule 12(h)(2) was revised to make clear that the omission from a Rule 12 motion of an available Rule 12(b)(6) grounds for dismissal does not operate as a waiver:

> "It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver . . . the more substantial defenses of failure to state a claim . . . and failure to state a legal defense to a claim . . . are expressly preserved against waiver by amended subdivision (h)(2) and (3)."

As the Second Circuit observed in *Santos v. Dist. Council of New York City of United Brotherhood of Carpenters*, 619 F.2d 963 (2d Cir. 1980):

> "By the express terms of Rule 12(h)(2), a 12(b)(6) defense 'may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment or the pleadings, or at the trial', and, by the express terms of Rule 12(g), is not waived by failure to include it in a Rule 12 motion raising other defenses." 619 F.2d at 967 n.4.

The relationship between Rule 8(c) and Rule 12 is not a novel question. All of the Circuit Courts that have decided the issue have unanimously held that Rule 8(c) is inapplicable to Rule 12 motions. *See, e.g.*, *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1977) ("[W]e know of no case in which a court has prevented a party from pleading res judicata in its answer simply because it failed to do so in an earlier motion to dismiss."); *Santos*, 619 F.2d at 967; *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 992 F.Supp. 1218, 1223-26 (D. Nev. 1998), *aff'd in relevant part*, 216 F.3d 764, 787-89 (9th Cir. 2000). None of the Circuit Court cases cited by AmBase holds to the contrary.

In short, AmBase's principal argument for *certiorari*, *see* Pet. at 8-18, asks this Court to review an issue which is not part of this case. Since Rule 8(c) is addressed to "pleadings", such as an answer, and since City Trust never filed an answer in this case, Rule 8(c) is not applicable to this case. City Trust filed a motion to dismiss under Rule 12(b)(6). There is no provision in Rule 8, Rule 12 or any other Federal Rule which suggests that City Trust was required to raise an available res judicata defense in that motion. Indeed, the structure of Rule 12, requiring in Rule 12(h)(1) the raising of all personal jurisdiction, venue, process and service of process defenses, and expressly providing in Rules 12(g) and 12(h)(2) that 12(b)(6) defenses for failure to state claim, such as res judicata and statute of limitations defenses, need not be asserted in a Rule 12 motion made on other grounds, is fatally inconsistent with AmBase's waiver arguments.

II. AMBASE'S ARGUMENT THAT CITY TRUST WAIVED RELIANCE ON THE PRECLUSIVE EFFECT OF THE DELAWARE CHANCERY OPINION IS A DISTORTION OF THE RECORD.

AmBase's argument that City Trust waived reliance on the preclusive effect of Chancellor Strine's opinion as to Delaware law is a misleading distortion of the record and inconsistent with the positions taken by AmBase in the courts below. City Trust built its entire motion to dismiss in the District Court around the preclusive effect of Chancellor Strine's opinion. City Trust argued that the Delaware opinion collaterally estopped AmBase from relitigating two of Chancellor Strine's factual findings, which together doomed AmBase's New York action to dismissal under the New York statute of limitations—namely, that all of AmBase's causes of action accrued in 1986 and that any argument AmBase might have had for equitable tolling expired in December 1996. Resp. App. at A-9 – A-10; A-13 – A-19. Contrary to AmBase's posturing before this Court, AmBase was fully aware throughout this litigation that City Trust sought to rely on whatever preclusive effect the Trust could secure from Chancellor Strine's opinion. In the District Court, AmBase observed: "[P]rincipally, the Defendant [City Trust] argues that AmBase is precluded from bringing the instant action by a recent decision by the Delaware Chancery Court dismissing a similar action brought by AmBase . . . ." Resp. App. at A-22. In the Court of Appeals, AmBase again admitted that City Trust was relying on the "preclusive effect" of "the decision of the Delaware Court." Resp. App. at A-43.

In opposing City Trust's motion to dismiss in the District Court, AmBase argued that Chancellor Strine's opinion was not entitled to preclusive effect because it was not a decision "on the merits". Resp. App. at A-30. City Trust rejoined that AmBase's "merits" argument was

irrelevant because City Trust was arguing that AmBase was collaterally estopped from relitigating certain dispositive factual findings by Chancellor Strine which barred AmBase's actions under the New York statute of limitations. Resp. App. at A-36 – A-39. It was in that limited context that City Trust said that it was not arguing that Chancellor Strine's opinion was res judicata, as indeed the Trust was not. But that is a far cry from saying that City Trust had abandoned the argument that the Chancellor's opinion had conclusively resolved all Delaware law issues decided or was entitled to res judicata effect.

At no time did AmBase ever question that Chancellor Strine's opinion had conclusively determined all decided issues of Delaware law. At no time did City Trust suggest that it was abandoning any preclusive effect that it might derive from Chancellor Strine's decision. Indeed, in both the District Court and the Court of Appeals, City Trust insisted that AmBase's New York action should be dismissed because of the preclusive effect of the Delaware opinion. Since both parties regarded the Delaware law issues to have been resolved, the argument in the courts below focused on the collateral estoppel effects of the Chancellor's opinion in the context of the New York statute of limitations. City Trust's continuing insistence on the collateral estoppel effects of Chancellor Strine's opinion in the Courts below precludes any good-faith assertion by AmBase that it honestly believed that City Trust intended to waive any preclusive effect it could derive from Chancellor Strine's opinion.

This Court has repeatedly observed that a waiver of substantial rights should not be inferred from ambiguous circumstances. Rather, to sustain a claim of waiver the Court has required that the party against whom the waiver is asserted must be proved to have made a deliberate, informed decision to waive by unambiguous record evidence. *See e.g.*,

Zerbst, 304 U.S. at 464; *Frick Co.*, 405 U.S. at 185-86; *CMI Corp.*, 1999 WL 92257, at * 12.

In short, City Trust did not waive its right to rely on any of the preclusive effects of the Delaware Chancery decision and the record leaves no room for any good-faith claim on AmBase's part that AmBase ever believed that City Trust had intended any such waiver.

III. AMBASE'S DUE PROCESS ARGUMENT FAILS WITH ITS WAIVER AND RULE 8(C) ARGUMENTS.

AmBase itself admits that its due process argument collides with the long-standing rule that a Court of Appeals may affirm a lower court decision on any ground supported by the record. *See* Pet. at 18-19; *see also, e.g.*, *Thigpen*, 468 U.S. at 28; *New York Tel. Co.*, 434 U.S. at 166 n.8; *MFS Sec. Corp.*, 277 F.3d at 617; *Shumway*, 118 F.3d at 63. AmBase's attempt to avoid the consequences of that principle rests solely on its waiver and Rule 8(c) arguments, both of which are shown above to be baseless. *See* pp. 15 – 21, *supra*. AmBase's claim that it is entitled to constitutional protection of expectations supposedly engendered by City Trust's alleged waiver fails because the record conclusively proves that AmBase had no such expectations and that there is no basis in the record for a good-faith claim that AmBase ever had any such expectations.

Nor has AmBase been deprived of the opportunity for any hearing which could make any difference to the outcome of this case. Under § 202 of the C.P.L.R., the only limitations laws potentially applicable to this case are those of New York or Delaware. Lower courts have found AmBase's claims to be barred by the laws of both states. AmBase has never suggested that the limitations statute of any other state should apply, and it is too late to do so now.

AmBase's problem is that it is attempting to sue on claims that accrued in 1986 and has no basis for any equitable tolling argument beyond December 1996. Those two facts mean that any conceivably actionable claims AmBase may have had are time-barred by the laws of both Delaware and New York, as Chancellor Strine and District Judge Stanton found—as well as by the law of any other state known to counsel.

AmBase has been given the most generous opportunity to argue that its claims are not time-barred under the laws of Delaware or the laws of New York, including a second wave of briefing permitted by Judge Stanton when AmBase switched legal counsel mid-stream in the District Court and three petitions for reconsideration, each of which was denied. AmBase has therefore had ample opportunity to present argument on all of the issues necessary and sufficient for the dismissal of its claims. In short, AmBase has plainly had all of the process which it is due—some would say even more.

IV. THIS CASE INVOLVES PETITIONER'S ASSERTION THAT THE SECOND CIRCUIT MADE A MISTAKE IN INTERPRETING STATE LAW. THAT IS NOT A FULL FAITH AND CREDIT ISSUE.

In its attempt to secure this Court's review, AmBase misdescribes its attack on an interpretation of state law by the Second Circuit as a full faith and credit issue, which this case does not present. Whatever else might be said about the Second Circuit's opinion, it was clearly not a denial of full faith and credit to the laws of Delaware. The Second Circuit did not decline to follow what it perceived to be Delaware law. To the contrary, the entire thrust of the Second Circuit's opinion was an attempt to determine and to apply Delaware law. The fact that AmBase's counsel profess to disagree with what the Second Circuit has determined the law of

Delaware to be does not mean that the Second Circuit is in any sense denying Delaware law full faith and credit. Any contrary view would transform any petitioner's attack on a Circuit Court interpretation of a state law into a federal full faith and credit issue.

Except in the rarest of cases, this Court does not grant writs of *certiorari* to review Circuit Court interpretations of state law. *See, e.g.*, *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law . . . ."); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts.") (citation omitted). AmBase's invocation of federal full faith and credit principles in this case is nothing more than an attempt to avoid that limitation and should be rejected out of hand.

As Justice Holmes observed in *Gold Issue Mining*, 243 U.S. at 96:

> "There is nothing to suggest that it [the Missouri Supreme Court] was not candidly construing the Colorado statutes to the best of its ability, and even if it was wrong, something more than an error of construction is necessary in order to entitle a party to come here under Article IV, § 1 [the Full Faith and Credit Clause]."[2]

The Delaware state courts have described their state's statutes of limitation in varying ways. For example, in

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[2] Although *Gold Issue Mining* dealt with the Full Faith and Credit Clause, this Court's practice of reviewing federal appellate court interpretations of state law only in extraordinary circumstances should apply equally to issues arising under the Full Faith and Credit Act.

Townsend, the Delaware Supreme Court described its statute of limitations in the following way:

> "It is well-settled that a plaintiff who receives a decision on the merits of a controversy from a court of competent jurisdiction is precluded thereafter by the doctrine of res judicata from bringing a subsequent action in another court based upon the same matter." 1995 Del. LEXIS 367, at * 2.

As this and other cases reveal, the proper characterization of any state's limitation laws is based on the particular form those laws take in that state as defined by state statutes and state case law. That particularity destroys any argument that the decision below conflicts with the decision of any other Circuit. AmBase points to no Circuit Court case that conflicts with the decision of the Second Circuit in construing Delaware law.

Inter-Circuit conflicts cannot be ascertained by asking whether Circuit opinions use the term "on the merits", as opposed to "substance and procedure", or by attempting to distinguish between what AmBase calls "deeper" inquiries and "shallower" inquiries. *See* Pet. at 23-30. Because the analysis of any state's statute of limitations is particular to that state, any attempt to find a conflict among different Circuit Court analyses by analyzing the infinitely varying language of their opinions is doomed to futility.

AmBase's assault on the cases relied upon by the Second Circuit in reaching its decision similarly raises no certiorable issue. In both *Loving* and *Williamson*, the federal courts applied Delaware statute of limitations law to federal causes of action and held that prior decisions holding the actions to be time-barred would be given "res judicata" effect and barred subsequent suits arising from the same allegations. Neither the *Loving* court nor the *Williamson* courts gave any

hint that their decisions depended on the fact that those cases involved the application of state limitations law to federal causes of action. Those courts did not suggest in any way that the outcome would have differed if the cases had involved state law claims. Indeed, the courts cited to generally-applicable principles of law which have been applied by both state and federal courts. *See, e.g.*, *Williamson*, 91 F. Supp. at 877-81, 186 F.2d at 466-70; *Loving*, 11 F. Supp. 2d at 490-92. There is therefore no reason to believe that any of those courts would have reached a different result in a diversity case involving state law claims.

AmBase's reliance on this Court's opinion in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), is likewise beside the point because the *Semtek* case involved the relevance of Fed. R. Civ. P. 41(b) to the effect which should be given to the judgment of a federal court in a subsequent state court proceeding—a circumstance which is present neither in this case nor in *Loving* or *Williamson*, rendering AmBase's discussion of Rule 41(b) completely irrelevant to the issues at hand.

AmBase's most revealing error in its attempt to conjure a federal full faith and credit issue where there is none is its attempt to ignore the cases relied upon by the Second Circuit on the grounds that those cases address the preclusive effect of dismissals on statute of limitations grounds only in subsequent proceedings in courts of the same jurisdiction. There is absolutely nothing in any of those cases to indicate that any of those courts attributed any significance to that fortuity. The point made in all of those cases is that the dismissal of an action because it is time-barred under the law of Delaware precludes the litigant from relitigating that Delaware law issue in another court in any jurisdiction, whether of the same state or another, whether the subsequent court is state or federal. The cases so holding are legion and

uniform in result and provide no suggestion that their preclusion of the subsequent suit is in any way dependent on whether the later court is in the same state system as the earlier court. *See, e.g., Cahn v. United States,* 269 F.Supp.2d 537, 544-45 (D.N.J. 2003); *William Poultry Co. v. Richardson-Merrell, Inc.,* No. 4-75-Civ 413, 1975 WL 1001, at *2 (D. Minn. Dec. 22, 1975); *Atkinson v. Pittsgrove Township,* 471 A.2d 1215, 1217 (N.J. Super. Ct. Ch. Div. 1983); *Fender v. St. Louis Southwestern Ry. Co.,* 392 N.E.2d 82, 85 (Ill. App. Ct. 1979). AmBase seeks to ignore that fact because it is fatal to its petition and its case.

AmBase manages to get through its entire petition without once mentioning that under § 202 of the C.P.L.R. only the law of New York or the law of Delaware can be applied to determining the timeliness of its suit in the Southern District of New York. Since AmBase is a non-resident of New York, since the causes of action in this case accrued in Delaware and since the relevant Delaware statute of limitations is shorter, § 202 mandates the application of Delaware law, whether one accepts the Second Circuit's analysis or not. The Delaware Chancery Court has of course decided that AmBase's claims are time-barred under Delaware law and no one—not even AmBase here petitioning the fourth tribunal to consider these issues—has suggested any reason why it is not precluded from relitigating that issue. Finally, even if Delaware law for some reason does not apply, it would make no difference. The only other law which could be applicable is the law of New York, which District Judge Stanton applied and correctly decided barred AmBase from bringing this action in New York. All of which brings us back to the initial and still unanswered question of what this case is doing in the Supreme Court of the United States.

CONCLUSION

For the reasons stated, Respondents respectfully request that this Court deny the petition for *certiorari*.

October 15, 2003

Respectfully submitted,

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IN THE COURT OF CHANCERY OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AMBASE CORPORATION, a Delaware corporation, Plaintiff, vs. CITY INVESTING COMPANY LIQUIDATING TRUST, as Successor to CITY INVESTING COMPANY, a dissolved Delaware corporation, et al., Defendants.	Civil Action No. 18207

Chancery Courtroom No. 1
Herrmann Courthouse
Wilmington, Delaware
Thursday, December 14, 2002

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

RULING OF THE COURT ON DEFENDANTS' MOTION TO DISMISS

CHANCERY COURT REPORTERS
135 Herrmann Courthouse
Wilmington, Delaware 19801
(302) 577-2447

THE COURT: Thank you very much.

While I don't ordinarily do this, in this case I am convinced with respect to at least one thing, and I don't feel

myself to be really plowing any new ground here in dealing with this. Putting aside the merits, I think I am not convinced – I certainly would need to think about it longer – that there isn't more than one plausible reading of the contract. What I am convinced of, based on the record, is that AmBase should have brought this claim a long time ago and that it is out of time.

This is a court of equity. We don't blindly follow a statute of limitations, but we do usually follow it unless there is some reason why we shouldn't. I don't see any reason here not to follow it.

This is not a case of sort of secondary indemnification, where someone has a contract in which they are primarily liable and they know that some other corporation or some other source is secondarily liable and where there is no expectation that the party that is secondarily liable will be anything until a liability really arises. That is not this kind of case. This wasn't a situation where AmBase was expected to defend this for 20-some odd years and then be able to just turn around at the time of a judgment and say to the liquidating trust, "Now you pay the judgment."

This is a situation where one entity divided itself, and it allocated liabilities and assets. AmBase became the agent with the Internal Revenue Service for certain tax liabilities of City Investing Company. It only became liable under the contract for things within the scope of that agency.

I believe in this circumstance if AmBase believed that it was being subjected to liability, the potential for liability and for costs in defending a claim which was not within the scope of that agency, that it could have immediately sued the trust and said, "This is not our liability. We don't have a contract with you to assume this liability, and unless you come up and come clean with the IRS, then you are essentially committing

a fraud or a tort, because we weren't the ones. We did not take this from you. We don't understand how we got this lemon. This is not what we bargained for." I think that kind of suit could have been brought in 1986, because here AmBase is simply saying we didn't have any part in this.

Now, there is this secondary part where they say, you know, if the trust itself can't handle anything, we are kind of the cleanup guarantor. But that is not what this case is about. This case is about saying, "This primary liability was never contractually shifted from City Investing Company to AmBase. It never was there in the first place. We shouldn't be dealing with this. It is not within the scope of the agency that we took on."

And I think it is proven that the case could have been brought by the fact that the case now seeks defense costs back to 1986 and saying that these should not have been borne by AmBase because AmBase should not have been in this position because this was not within the scope of the tax claims which AmBase contractually agreed to take from City Investing Company. Giving AmBase all of its due, the claim began to run at least as early as the notice of deficiency, because if you don't act on the notice of deficiency by challenging it, it is going to be reduced to a judgment. All along this has been a sum certain, and interest has been running.

I don't believe – and if it were the only issue, I would be tempted to give the plaintiffs leave to replead. If the only thing that this was turning on was the notion that some of the trustees overlapped, I might give the plaintiffs leave to replead and deal with that issue. But Mr. Collins has very candidly admitted that he doesn't even think that the overlapping trustees consisted of a majority of the AmBase board.

I am not at all convinced that they had the sort of conflict that our law would say disabled them from acting on behalf of AmBase. Certainly nothing has been pled that would indicate that they had any improper personal motivation to disadvantage AmBase in order to benefit the liquidating trust. They seem to have a fairly important stake in each entity.

But putting that aside, the fact is that by the facts pled in the complaint itself, no trustees were left on the board of AmBase by I think the end of 1995. By the end of 1996 Mr. Mantell was gone as an officer, and so this cloud that supposedly kept this corporate entity from discovering a claim that was based on a contract that was out there in the open, clearly there was no disability on its part from beginning at that point to act. It didn't file in December '97, didn't file in December '98, didn't file in December '99. Didn't file until August 14 of 2000.

Plainly there was inquiry notice out there. All these documents were in the possession of the corporation itself. It was represented by an able New York law firm. It has officers. All they had to do was read their own agreement. And I just don't think – and I agree with the defendants here that under the borrowing statute, we would apply the shorter limitations, which would be the Delaware period. I think that is what the Petzer case did, and that is certainly, I think, the appropriate period to be looking at here, not saying under New York law. So I just don't understand how there really is anything that tolled the statute of limitations. As I said, I am inclined to think it began running much earlier than the 1990's, but clearly it began running by '95. And there has been no disability on the part of AmBase.

Alternatively, as the Petzer case did, the equitable doctrine of laches – it is a little unusual, I think, to apply that on the basis of a complaint, but I think the complaint itself

pleads facts which convince me that the defendants' resort to laches is appropriate and also merits dismissal.

The trust was essentially denied the opportunity that it should have had to control the destiny of the dealings with the IRS. Again, even assuming that there was some disability until the mid-1990's, still the trust wasn't given the opportunity to cut off interest at any point. I don't know what would have happened, but I don't think that that is the defendants' burden here. The fact is, because of AmBase's failure to raise this argument in a timely way, the trust never had the chance as a trust to pay this money. That may have made a lot of economic sense in the context of a trust, but it was denied that opportunity. It also didn't have a chance to direct the negotiations with the IRS.

We don't lightly disregard separate corporate entities in Delaware. And the fact that there was some overlapping directors doesn't mean that I can assume that the trust and AmBase would have been exactly the same entity under the law. An operating company and a liquidating trust may have very different objectives. There may be a very different bargaining strategy.

What is clear out of this is no one knows what the trust would have done, but we do know that the trust didn't have that choice. And I think the Porach case that Vice Chancellor Lamb wrote and even the Petzer case indicate that laches can be appropriately invoked when a party reasonably changes a position to their detriment and relies on another party's conduct. And here it was reasonable to assume for the trustees that this was being taken care of primarily by AmBase and for them to have planned their conduct accordingly. And it is pled in the complaint, in fact, that there have been substantial distributions out of the trust that have reduced the trust to less than the liability owed to the IRS.

So for all those reasons and the reasons I think very well stated by the defendants in their paper, I am convinced from the facts of the complaint and the documents attached to the complaint that the defendants' motion to dismiss on statute of limitations and laches grounds is meritorious, and I would sign an appropriate order that was submitted promptly by the defendants after approval as to form by the plaintiffs.

I want to thank everybody. I don't ordinarily rule from the bench, and it is not because it was such an easy case to come to that conclusion. The papers on both sides and the arguments were very clear and effective. But I am sufficiently convinced that it is the right result and that I am not really breaking any new ground, that at least this aspect of this matter will move along promptly.

So I will wait for an order from the defendants. Thank you.

- - -

(Court adjourned at 4:13 p.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMBASE CORPORATION, a Delaware corporation, Plaintiff, -against- CITY INVESTING COMPANY LIQUIDATING TRUST, as Successor to CITY INVESTING COMPANY, a dissolved Delaware corporation, and GEORGE T. SCHARFFENBERGER, EBEN W. PYNE and LESTER J. MANTELL, Individually and as Trustees of the CITY INVESTING COMPANY LIQUIDATING TRUST, Defendants.	01 Civ. 0771 (LLS)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Introduction

Defendant City Investing Company Liquidating Trust (the "Trust") respectfully submits this memorandum in support of its motion to dismiss the Complaint as to all defendants on the grounds of the statute of limitations and laches.[1] This action has already been dismissed on those grounds by the Delaware Chancery Court by bench opinion

[1] The Trust also moves to dismiss the breach of fiduciary claim set forth in Count III of the Complaint on the ground that it fails to state a valid cause of action under New York law.

on December 14, 2000 (Exhibit A); by final order dated January 3, 2001 (Exhibit B); and by opinion dated February 7, 2001, denying AmBase's motion for reargument (Exhibit C; hereinafter referred to as "Strine Op."). All Exhibits are attached to the affidavit of Paul M. Dodyk dated February 22, 2001.

Statement of Facts[2]

This case arises out of an Assignment and Assumption Agreement between plaintiff AmBase Corporation (then known as the Home Group, Inc.) ("AmBase") and City Investing Company ("City") dated August 30, 1985 (the "Assignment Agreement"). (Exhibit D.)

AmBase was at that time a wholly owned subsidiary of City and the parent of The Home Insurance Company. (Strine Op. 2-3.) The Assignment Agreement was entered into by City and AmBase incident to the stockholder-approved liquidation of City in September 1985 to assume the liability for the future payment by AmBase of certain tax and other liabilities so that City could proceed with its liquidating distributions to City stockholders. The Assignment Agreement also allowed AmBase to improve its balance sheet by eliminating a substantial debt owed by AmBase to its parent, City. Under the Assignment Agreement, AmBase assumed "all obligations of City for Federal income taxes (including interest and penalties thereon) as common parent of the City Affiliated Group.

* * *

[2] The statement of facts in this memorandum is largely drawn from the Complaint and Vice Chancellor Strine's opinion, attached as Exhibit C.

In addition, AmBase has attempted to mislead the Court into excusing its tardiness by alleging its exclusive reliance upon individual defendants and concealing the existence of an opinion from Willkie, Farr & Gallagher which AmBase sought and which advised that AmBase could not avoid its liability under the Assignment Agreement. (Exhibit H.)

The Trust, its Trustees, and its unitholders have already had to bear the burdens of twice defending against AmBase's unfounded claims, once in securing their dismissal in Delaware and, secondly, in opposing AmBase's ill-considered motion for reargument. Any competent practitioner, with a copy of the C.P.L.R. and a modicum of effort, could have easily ascertained that this action cannot be pursued in New York in good faith.

If the Court deems Rule 11 sanctions appropriate, the Trust will make the necessary application to recover all of the fees and expenses that it has and will sustain in defending this action, together with any additional deterrent sanction the Court deems appropriate in the circumstances.

ARGUMENT

I. AMBASE'S BREACH OF CONTRACT CLAIM IS BARRED BY THE NEW YORK STATUTE OF LIMITATIONS CONTAINED IN C.P.L.R. § 213(2)

C.P.L.R. § 213(2), applicable to "an action upon a contractual obligation or liability, express or implied", governs AmBase's claims arising from the Assignment Agreement. That statute imposes a six-year period of limitations.

Under New York law, that period runs from the date of the breach:

> Generally, any Statute of Limitations begins to run when a cause of action accrues (C.P.L.R. 203(a)). In New York, a breach of contract cause of action accrues at the time of the breach.

Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402, 599 N.Y.S.2d 501, 502, 615 N.E.2d 985, 986 (1993). *See also John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 550, 415 N.Y.S.2d 785, 788, 389 N.E.2d 99, 102 (1979); *Edlux Constr. Corp. v. State*, 252 A.D. 373, 374, 300 N.Y.S. 509, 511 (1937), *aff'd*, 277 N.Y. 635, 14 N.E.2d 197 (1938).

As Vice Chancellor Strine found, the alleged breach of contract occurred not later than 1986 when AmBase received the IRS Report and assumed the responsibility of defending against the IRS claim. That Report notified AmBase of the nature of the IRS claim and its approximate amount. Under AmBase's theory of this case, the Trust was responsible for the defense of that claim. AmBase could, therefore, have asserted a claim against the Trust upon receipt of the IRS Report. (Strine Op. 4, 8.) As a result, AmBase's cause of action accrued in 1986 and is barred by C.P.L.R. § 213(2).

Because Vice Chancellor Strine found that, on AmBase's theory of this action, the Trust was responsible for responding to the 1986 IRS Report and that AmBase could have brought this action as early as 1986, AmBase is bound by that accrual decision and estopped from relitigating that issue here. Under New York law, a party is precluded where "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party . . . had a full and fair opportunity to litigate the issue". *Whitney Holdings, Ltd. v. Givotovsky*, 988 F. Supp. 732, 737 (S.D.N.Y. 1997) (Kaplan, J.) (quoting *Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995)). Both conditions have been satisfied in this case.

Even if this Court were to find that AmBase is free to relitigate this issue, Vice Chancellor Strine's decision is clearly correct. Since receipt of the IRS Report put AmBase on notice as to the nature of the Income Tax Liability and its amount and triggered a duty to defend, AmBase could have sued the Trust in 1986. Since settled law marks the accrual for an action sounding in contract from the contractual breach, and since nominal damages are always available in contract actions, all the elements necessary to maintain a lawsuit and obtain relief in court were present at the time of the alleged breach in this case. *See, e.g., Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94-95, 595 N.Y.S.2d 931, 933-34, 612 N.E.2d 289, 291-92 (1993).

Accordingly, Count I of the Complaint is time barred because 14 years have elapsed since accrual of the cause of action. Count II, labeled Restitution, Unjust Enrichment and Implied Contract, is also barred by C.P.L.R. § 213(2) because it seeks as damages the expenses incurred by AmBase since 1986 in defending the tax claim and is based on the alleged breach of contract. The same is true of Count IV, labeled "Indemnification".

II. COUNT III OF THE COMPLAINT ALLEGING A BREACH OF FIDUCIARY DUTY FAILS TO STATE A CAUSE OF ACTION AND IS BARRED BY THE SIX-YEAR PERIOD OF LIMITATIONS IN C.P.L.R. § 213(7)

AmBase has no standing to assert a breach of fiduciary duty against defendants Scharffenberger, Pyne and Mantell because AmBase was a wholly owned subsidiary of City alit the time the Assignment Agreement was entered into. As officers and directors of City, the individual defendants owed a duty to City and its stockholders. As this Court put the point in *Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826, 832 (S.D.N.Y. 1996):

> [T]hose who operate the parent company owe no fiduciary duties to the wholly owned subsidiary, and even when the parent company announces a proposed spin-off of the subsidiary, the directors of the parent and the directors of the subsidiary owe no fiduciary duties to the soon-to-be independent subsidiary's prospective stockholders.
>
> Because the officers and directors of a parent company owe allegiance only to that company and not to a wholly owned subsidiary, it is reasonable to conclude that a parent corporation itself is under no obligation to provide the subsidiary with independent representation during the spin-off process. . . . Aviall has not cited, and I have not found any case imposing more exacting duties on a parent, or holding that the form or content of a particular spin-off agreement constitutes a breach of the fiduciary duties owed to the stockholders of either the parent or the subsidiary.

In reaching this conclusion, the Court relied on the well-known Delaware precedent, *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1174 (Del. 1988) in which the Delaware Supreme Court rendered the modern articulation of that principle.

That principle is fully applicable to this case. AmBase was a wholly owned subsidiary of City at the time the Assignment Agreement was entered into in August 1985. The Assignment Agreement was entered into incident to City's liquidation. Under that agreement, AmBase assumed certain tax and other liabilities from City so that City could proceed with its distribution in liquidation. City paid AmBase approximately $180,000,000 for that assumption. As Vice Chancellor Strine put it, City simply divided its assets and liabilities as between certain wholly owned entities in the manner deemed most advantageous for its

stockholders. City then distributed shares of AmBase and units of the Trust to its stockholders who effectively received distributions of both securities in proportion to City's stock. The transaction raised no issues of fairness as between AmBase and the Trust because both entities were owned by the same persons in the same relative amounts. AmBase, therefore, has no standing to assert a claim of breach of fiduciary duty.

In any event, any claim of breach of fiduciary duty is barred by the statute of limitations. Section 213(7) imposes a six-year period of limitations for breaches of duty asserted by a corporation against a past or present officer or director. There is no longer statute of limitations in the C.P.L.R. which could conceivably apply.

The period of limitations runs from the date of breach:

> CPA § 48(8), Section 213(7)'s predecessor, was enacted in large part to shorten the prescriptive period applicable to claims brought by or on behalf of corporations against their directors, officers or shareholders . . . . The legislature effected this goal not only by reducing the number of years within which to bring claims . . . but also by opting to have such claims accrue upon breach, rather than upon plaintiff's discovery of the breach.

Whitney, 988 F. Supp. at 743.[3]

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[3] There is an exception for breaches alleged to constitute actual fraud. That exception is irrelevant both because AmBase has not alleged actual fraud and because AmBase's claim would still be barred because AmBase did not bring its claim within two years of discovery as required by C.P.L.R. 203(g) and found by Vice Chancellor Strine. (Strine Op. 16.) (See pp. 24-26, infra.)

AmBase's fiduciary duty claim is C.P.L.R. § 213(7) because that breach occurred no later than 1986. AmBase alleges that the individual defendants caused AmBase to "assume the costs and expenses of defending against the alleged withholding tax liability". (Complaint ¶ 16.) As Vice Chancellor Strine found, that assumption occurred not later than 1986 when AmBase received the IRS Report. While the individual defendants may have allegedly taken other actions claimed to be breaches of fiduciary duty at a later time, the breach initially occurred no later than 1986. As Vice Chancellor Strine noted, AmBase could have asserted its claim at that time. (Strine Op. 4-5, 8.) Accordingly, AmBase's breach of fiduciary duty claim accrued in 1986 and is barred by the six-year period of limitation set forth in C.P.L.R. § 213(7).

III. AMBASE'S NEGLIGENCE AND MALPRACTICE CLAIMS ALLEGED IN COUNT VI ARE BARRED BY C.P.L.R. § 214(6)

In Count VI of the Complaint, AmBase alleges that Mr. Mantell committed professional malpractice by failing to embrace the improbable theory which AmBase has belatedly concocted in an effort to renege on an obligation it had recognized for over 14 years. Vice Chancellor Strine described AmBase's allegation in the following less-than-charitable terms:

> [AmBase] spins a new yarn about the substantial motivations that Mantell had to cover up the Trust's possib[le] liability for the withholding tax liability. The new theory in large part reduces to the assertion that it made little business sense for City to allocate the withholding tax liability to the Trust rather than to AmBase, and that Mantell faced exposure to the Trust

> for his alleged failure to make sure that the liability was allocated to AmBase in the Assignment Agreement.[15]
>
> Putting aside the many reasons that this theory seems improbable,[16] the theory does not explain the over three and a half year delay that followed Mantell's departure from AmBase. Again, it bears emphasis that the supposed motivations that Mantell harbored to favor the Trust were known by AmBase's other directors and officers since 1985. AmBase's argument thus reduces to its assertion that Mantell had placed some Svengali-like spell on AmBase's board that did not wear off until more than three years after he left. (Strine Op. 19-20.)

Section 214(6) imposes a three-year period of limitations on the malpractice claim against Mr. Mantell alleged in Count VI. The acts alleged to have been committed by Mr. Mantell are the same acts as those alleged to constitute the breach of fiduciary duty. Those acts, therefore, took place not later than 1986. As in the case of breach of fiduciary duty, a cause of action for malpractice accrues upon the date of the alleged practice. *See Glamm v. Allen*, 57 N.Y.2d 87, 93, 453 N.Y.S.2d 674, 677, 439 N.E.2d 390, 393 (1982) ("An action for malpractice accrues at the date of the malpractice complained of.").

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[15] The reader should remember that it is the defendants' position that the Assignment Agreement did in fact make AmBase primarily liable for the withholding tax liability. AmBase's assertion that assignment of the disputed liability to the Trust was at least counter-intuitive from a business perspective has the unintended effect of supporting defendants' argument on the merits. [footnote of Vice Chancellor Strine]

[16] The improbability of the theory is well articulated in the defendants' answer to AmBase's reargument motion. [footnote of Vice Chancellor Strine]

AmBase's malpractice action, therefore, accrued no later than 1986 and is clearly time barred.

IV. AMBASE IS NOT ENTITLED TO CLAIM EQUITABLE TOLLING; EVEN IF IT WERE, AMBASE FAILED TO SUE WITHIN THE TWO-YEAR PERIOD FROM DISCOVERY MANDATED BY C.P.L.R. § 203(g)

Under New York law, a plaintiff seeking to avoid a statute of limitations by claiming equitable estoppel must be able to plead that it used reasonable diligence to acquire knowledge of its claim. *See Whitney*, 988 F. Supp. at 747. AmBase cannot do so because it is estopped by Vice Chancellor Strine's findings. Vice Chancellor Strine found that the AmBase Board knew of defendants' positions with the Trust and knew or had reason to know that the defendants might own Trust units. (Strive Op. 13.) He found that under these circumstances, the AmBase Board was not justified in relying upon defendants' view of AmBase's obligations under the Assignment Agreement. (Strive Op. 13.) Vice Chancellor Strine went on to note that neither the Assignment Agreement nor the Internal Revenue Code were unknown to the AmBase Board and that diligence required the Board to look into the matter of AmBase's liability, independent of reliance on the individual defendants. As Vice Chancellor Strine put it:

> Because the AmBase board chose to rely on Mantell with full knowledge of his Trust affiliations, AmBase contends that it had until the end of the universe to file this suit. I continue to reject this view that corporations and their directors have no obligation to act in a commercially diligent manner in discovering and asserting claims. (Strive Op. 20.)

Moreover, under New York law, there is no equitable tolling absent actual fraud. Allegations of constructive fraud will not suffice. *See Whitney*, 988 F. Supp. at 744, 747; *Quadrozzi Concrete Corp. v. Mastroianni*, 56 A.D.2d 353, 356, 392 N.Y.S.2d 687, 688 (1977). AmBase cannot, and does not, allege actual fraud. Therefore, all of AmBase's cause of action accrued upon breach of the duty and not upon some later discovery of the breach.

Finally and most conclusively, even if AmBase had alleged actual fraud, AmBase should have sued within two years of the time when the plaintiff discovered the relevant facts or "from the time when facts could with reasonable diligence have been discovered", as required by C.P.L.R. § 203(g). *See, e.g., Stride Rite Children's Group, Inc. v. Siegel*, 269 A.D.2d 875, 876, 703 N.Y.S.2d 642, 643 (2000). As this Court ruled in *Union Carbide Corp. v. Montell, N.V.*, 944 F. Supp. 1119, 1138 (S.D.N.Y. 1996): "[The] doctrine of equitable tolling is 'subsumed within [C.P.L.R.] 203(g)' . . . Therefore, 'applicability of [the equitable tolling] doctrine cannot extend the limitations period beyond the two years prescribed by the statute.'" (*quoting Glynwill Investments, N.V. v. Prudential Sec., Inc.*, 1995 WL 362500, *4 (S.D.N.Y. June 16, 1995)). Vice Chancellor Strine said:

> I held that no later than December 1996 AmBase was on full inquiry notice and possessed all the knowledge it needed to bring its claim. (Strine Op. 16.)

As a result, AmBase is collaterally estopped to deny knowledge of its claims at any time after December 1996. Since AmBase failed to sue within two years of that date, its complaint would also be barred by C.P.L.R. § 203(g).

V. AMBASE'S CLAIMS ARE BARRED BY LACHES

Under New York law, "[l]aches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' The essential element of the equitable defense is delay prejudicial to the posing party." *Matter of Barabash*, 31 N.Y.2d 76, 81, 334 N.Y.S.2d 890, 894, 286 N.E.2d 268, 271 (1972) (citations omitted). In this case, Vice Chancellor Strine also held that AmBase's claim was barred by laches. Vice Chancellor Strine found:

(1) "In the alternative, I held that the doctrine of laches also barred AmBase's claim. I based that alternative holding on the facts pled in the complaint, and concluded that those facts demonstrated that the requisite elements of laches existed." (Strine Op. 16.)

(2) "AmBase had reason to know of its claims for quite a long time, but did not assert them until August 2000." (*Id.*)

(3) "During the long delay that had transpired since the withholding tax liability first emerged in 1986, the Trust had taken actions in reliance upon the undisputed fact that AmBase had acted as if it was primarily liable for the disputed tax. In particular, the Trust had distributed out assets that could have been used to satisfy the liability." (*Id.*)

Vice Chancellor Strine also noted that the Trust could have also paid the tax of $21,000,000 and avoided the accrual of interest, which AmBase claims is now approximately $120,000,000. (Strine Op. 17; Complaint ¶ 12.) All of these facts led Vice Chancellor Strine to conclude that AmBase's

claim was also barred by laches. The very same considerations justify the very same result in this case. Indeed, since the issue in this case is identical to that decided by Vice Chancellor Strine and since AmBase had a full and fair opportunity to litigate the issue, AmBase is bound by that decision.

Conclusion

For the reasons stated, Defendant City Investing Company Liquidating Trust respectfully requests that the Court dismiss this action as against all defendants. The Trust also respectfully suggests that sanctions under Fed. R. Civ. P. 11 are appropriate, given the circumstances of this case.

February 23, 2001

Cravath, Swaine & Moore

by /s/ Paul M. Dodyk
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMBASE CORPORATION, a Delaware corporation, Plaintiff, v. CITY INVESTING COMPANY LIQUIDATING TRUST, as Successor to CITY INVESTING COMPANY, a dissolved Delaware corporation, and GEORGE T. SCHARFFENBERGER, EBEN W. PYNE and LESTER J. MANTELL, Individually and as Trustees of the CITY INVESTING COMPANY LIQUIDATING TRUST, Defendants.	No. 01 Civ. 0771 (LLS)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT CITY INVESTING COMPANY LIQUIDATING TRUST'S MOTION TO DISMISS

Plaintiff AmBase Corporation ("AmBase" or "Plaintiff"), respectfully submits the following opposition to the Motion to Dismiss filed by Defendant City Investing Company Liquidating Trust ("the Trust" or "Defendant") with this Court February 23, 2001.

PRELIMINARY STATEMENT

According to Defendant, this case is at bottom an action for a breach of contract that occurred in 1986, and that is therefore precluded by the six-year Statute of Limitations found in the CPLR. Specifically, Defendant characterizes

four of AmBase's six counts as being based directly on AmBase's breach of contract claim and as therefore barred by CPLA §213 (2).

* * *

This request had absolutely nothing to do with an analysis of whether or not the Agreement's assignment of responsibility for "income taxes of City ... as common parent of the City Affiliated Group" encompassed *withholding* taxes. Rather, the request dealt solely with how AmBase might be able to deal with the fact that City's business records substantiating its earlier deductions had been lost, raising the possibility that the IRS would, in its audit of City's prior tax years, hold AmBase responsible for paying the increased federal *income* tax liability that was quite obviously attributable to City as common parent of its consolidated group. While the Willkie letter states its understanding of the Agreement in broad language, it quite clearly does not address the question presented by this case or any question even analogous to it. Accordingly, the Defendant has mischaracterized the Willkie letter by asserting that this letter somehow undermines AmBase's allegations regarding the failure by the individual defendants to seek professional advice on whether the Agreement assigned the Withholding Obligation to AmBase, and regarding the fact that the individual defendants caused AmBase to assume the costs of litigating the Issue.

Because the Willkie letter did not address the question, and because no independent tax professional was ever asked to address the question, AmBase did not discover the fact that the Agreement did not cover the Withholding Obligation until the summer of 2000. While the Defendant quotes from the Delaware court's statements regarding the fact that a majority of the AmBase board was independent of the Trust and was fully cognizant of the affiliation with the Trust of the three individual defendants, the fact remains that the only person with the requisite tax skills who would actually have

been likely to have reviewed the Agreement to see if it encompassed withholding tax is defendant Mantell. There would have been no reason for any AmBase board member to have questioned Mantell's determination that the Agreement properly assigned the Withholding Obligation to AmBase. By contrast, there would have been good reason for this issue to occur to an experienced tax professional like Mantell who was in charge of managing all of AmBase's tax issues. Nevertheless, there is no evidence that he ever asked any of his employees or AmBase's outside tax specialists to consider the issue. Indeed, the outside tax specialists engaged by Mantell to litigate the Withholding Obligation with the IRS were not even given the Agreement by Mantell. *See* Ex. D, ¶¶ 9-10.

SUMMARY OF ARGUMENT

The Defendant argues that AmBase's claim is time-barred. Principally, the Defendant argues that AmBase is precluded from bringing the instant action by a recent decision by the Delaware Chancery Court dismissing a similar action brought by AmBase against the same defendants. The actual holding of the Delaware Chancery Court was that AmBase's claims in that action fell outside of the applicable three-year statute of limitations because the claim had accrued and could have been brought no later than December 1996, when Mantell left AmBase. While AmBase strongly believes the Delaware court was in error, it is sufficient for this action simply to point out that, even according to the Defendant, the applicable limitations period for all but one of the counts in this action is six years, not three. *See* MTD at 14-15. Thus, to the extent it is appropriate to test any of AmBase's claims as if they accrued as of December 1996, the Delaware decision in no way precludes AmBase from advancing these claims in New York.

More importantly, Defendant seeks to cast this case as an action based on an alleged breach of contract that took place in 1986. But, contrary to the Defendant's characterization of AmBase's complaint, AmBase has not asserted any claim for breach of contract, nor even alleged that the Agreement has been breached. Indeed, a breach of the Agreement will not -- can not -- occur until such time as the underlying withholding tax liability is judicially determined to exist. The heart of this case is AmBase's request for a judgment declaring that the Trust rather than Abase *will* be primarily liable for the Withholding Obligation *if* any such withholding tax is ultimately held to be due and owing to the United States. Under the law of New York, and everywhere else, a declaratory judgment action that seeks to resolve a dispute over how a *future* or *contingent* liability is to be paid cannot be time-barred when the cause of action to dispute the payment of the underlying liability has itself not yet accrued. This commonsense result demonstrates that AmBase cannot be time-barred from bringing this action to have the Court *declare* that the Trust *will* be primarily liable for the Withholding Obligation in the event that the IRS prevails in the Tax Court litigation, and, accordingly, to enjoin the Trust from making any further distributions of its assets that would increase AmBase's exposure to additional risk of *secondary* liability for the withholding tax (if any is due).

AmBase also alleges that the management of AmBase by defendants, and in particular the management of AmBase's tax matters by defendant Mantell, has caused AmBase to incur substantial expenses in litigating against the IRS, expenses that the Trust should itself have borne because it is in fact primarily liable for the Withholding Obligation. The majority of these expenses have been incurred since receipt of the IRS's Notice of Deficiency in May of 1995. In addition, AmBase alleges that during the course of Defendants' management and control of both AmBase and

the Trust from 1986 through 1996, Defendants breached their duties to AmBase by causing AmBase to believe that it was primarily liable for the Withholding Obligation, and caused the Trust to pay out $280 million dollars in distributions, thereby increasing AmBase's exposure on the Withholding Obligation as the entity that is secondarily liable. Defendants caused AmBase to believe that it was primarily liable for the Withholding Obligation by not informing AmBase that the Agreement did not cover this tax, and by not retaining qualified outside counsel to review the Agreement in order to confirm that the Withholding Obligation was not actually covered by the Agreement. This continuous breach of fiduciary duty, which persisted right up to Mantell's December 1996 departure from AmBase resulted in the defendants' collective unjust enrichment to the extent that AmBase bore the expense of defending against the IRS's challenge. Moreover, because of the defendants' failure to disclose or acknowledge the truth to AmBase regarding the Withholding Issue, they are estopped from arguing that these claims are time-barred. For the same reason, AmBase's claims against defendant Mantell for professional malpractice should be allowed to proceed.

ARGUMENT

I. THE DECISION OF THE DELAWARE COURT OF CHANCERY APPLIED A THREE-YEAR STATUTE OF LIMITATIONS AND THEREFORE DOES NOT PRECLUDE THIS CASE

In its Statement of Facts, the Defendant quotes extensively from the February 7, 2001 opinion by Vice Chancellor Strine reaffirming his dismissal of AmBase's Complaint in the Delaware Chancery Court ("Delaware Opinion"). Defendant appears to rely upon the Delaware Opinion chiefly for the proposition that AmBase could have sued the Trust in 1986 for the same breaches on which it sues

in this action. *See* MTD at 18-19, 22-23, 24. The Defendant places great reliance on this proposition, and even goes so far as to assert that it *precludes* this Court from allowing this action to proceed.

As the Defendant's own memorandum makes quite clear, however, the Delaware Opinion plainly does not foreclose the current action for the simple reason that the Delaware Opinion rested upon a statute of limitations that is three years *shorter* than the statute of limitations applicable in this case. Defendant accurately summarizes the holding of the Delaware Chancery Court on page 14 of its memorandum, stating that "Vice Chancellor Strine concluded that AmBase's claim was barred because AmBase had failed to sue within three years of December 1996." MTD at 14. Immediately after reciting this basic fact, the Defendant moves on to summarize its legal arguments by stating that AmBase's Counts I, II, III, IV, and V are all barred by New York's *six year* statute limitations that applies to each those actions. Thus, Defendant concedes that AmBase has filed its Complaint within six years of the date Vice Chancellor Strine used as the starting point for his statute of limitations analysis, yet nevertheless argues, incongruously, that New York's six-year statute of limitations bars this action. Far from precluding the instant case, the Delaware Opinion simply casts into sharp relief why AmBase's claims, while possibly time-barred in Delaware, are certainly viable in New York.

Moreover, while the Defendant cites to various portions of the Delaware Opinion that describe why AmBase may have been injured as early as 1986, it is quite clear that these descriptions of the case do *not* constitute elements of Vice Chancellor Strine's holding. Rather, the foundations for the holding are that (1) AmBase's claims were "ripe as of 1995, if not in 1986," (Delaware Opinion at 9), (2) applying Delaware law, Vice Chancellor Strine held that it was

appropriate to apply a three-year statute of limitations to all of AmBase's claims, including its claims for a declaratory judgment and injunctive relief (Delaware Opinion at 10), and (3) the statute of limitations was not equitably tolled beyond December of 1996 since as of that month the individual defendants were no longer officers or directors of AmBase (Delaware Opinion at 10-16).

While AmBase certainly takes issue with the Delaware Opinion, it is wholly untenable to argue that the decision in any way precludes AmBase's New York action. As Defendant recites, New York precludes a party from rearguing an issue only where "the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party ... had a full and fair opportunity to litigate the issue." *See Whitney Holdings Ltd. v. Givotovsky*, 988 F. Supp. 732, 737 (SDNY 1997) (Kaplan, J.) (*quoting Colon v. Coughlin*, 58 F.3d 865, 869 (2d Cir. 1995)). None of the three necessary elements to the holding of the Delaware Chancery Court are being placed at issue in this case. AmBase's claims in New York do not depend upon whether AmBase's claims were ripe in 1995, nor upon whether Delaware law imposes a three-year statute of limitations on all of AmBase's claims including those for a declaratory judgment and an injunction, nor upon whether it is possible to equitably toll the statute of limitations beyond December of 1996. Stated differently, even if all three of the "necessarily decided" elements of the Delaware Opinion are binding in this action, AmBase still has a viable cause of action for each of its claims. The simple reason for this is that, as the Defendant acknowledges throughout its brief, New York applies a six-year limitations period to AmBase's actions, which therefore allows AmBase to bring those actions *even if* AmBase's causes of action are held to have accrued as of December 1996, and *even if* Delaware law would apply a three-year statute of limitations and would time-bar even the declaratory judgment relief AmBase seeks.

These "foundational elements" to Delaware Opinion, while possibly incorrect and while certainly adverse to AmBase in Delaware, do not stand in the way of AmBase bringing its cause before this Court.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AmBASE CORPORATION, a Delaware corporation,

Plaintiff,

-against-

CITY INVESTING COMPANY LIQUIDATING TRUST, as Successor to CITY INVESTING COMPANY, a dissolved Delaware corporation, and GEORGE T. SCHARFFENBERGER, EBEN W. PYNE and LESTER J. MANTELL, Individually and as Trustees of the CITY INVESTING COMPANY LIQUIDATING TRUST,

Defendants.

01 Civ. 0771 (LLS)

MEMORANDUM OF LAW

* * *

Further, contrary to the assertion of the defendants, the Delaware Court's decision does not enjoy preclusive effect. Delaware does not give preclusive effect to dismissal on statute of limitation grounds. Certainly, the Vice Chancellor's holding (as opposed to dicta) does not in any event preclude this action. Accordingly, accepting the applicable six-year statute of limitations and the earliest

possible accrual date of May 1995, no legal grounds exists for the dismissal of the Complaint.[5]

Given the absence of a legal or factual basis for the motion to dismiss, coupled with the legitimate basis for amending the Complaint, AmBase requests that the Court deny defendants' motions in their entirety and grant AmBase leave to serve and file an Amended Complaint.

II

THE DECISION OF THE DELAWARE CHANCERY COURT HAS NO PRECLUSIVE EFFECT

Examined under the applicable law, the prior decisions of the Delaware Court have no preclusive effect on the case before this Court. The Supreme Court has "now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81 (1984). *See also Allen v. McCurry*, 449 U.S. 90, 96

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[5] AmBase requests that in the event the Court were to grant or deny the motions to dismiss, it be given leave to file its Amended Complaint. Along with deleting the current claim against defendant Mantell solely, the proposed Amended Complaint would establish a series of contract and contract-related claims against the Trust. These previously unpled claims relate back directly to the original set of allegations, and clarify AmBase's role and the specific injuries that it has suffered. The Second Circuit has upheld a party's right to enjoy the opportunity to amend its Complaint, even when the court dismisses the original Complaint. *See Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990). Here, leave to amend has become necessary as post filing events have occurred: the Tax Court has finally resolved the Withholding Tax Litigation and, consistent with its contractual arrangements with the Trust, AmBase may now recover the costs and other damages that it incurred in its role as agent for City Investing in that matter.

(1980). The Second Circuit adheres to this twenty-year-old rule. *See H. Frederick Johnston v. Arbitrium (Cayman Is.) Handels AG*, 198 F.3d 342, 347 (2d Cir. 1999) analyzing prior holding of Delaware Chancery Court under Delaware law). *See also Conopco, Inc. v. Roll Internat'l*, 231 F.3d 82, 87 (2d Cir. 2000) (citing *Migra* and continuing that "[f]ederal courts may not 'employ their own rules . . . in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken'") (authority omitted)). Indeed, your Honor has recognized and applied this doctrine previously in *Clissuras v. Equal Employment Opportunity Commission*, 1990 U.S. Dist. LEXIS 8284 (S.D.N.Y. 1990) (Stanton, J.). Accordingly, Delaware Law will dictate the degree to which this Court shall give the Delaware Court's decisions any preclusive effect.

Delaware courts do not give collateral estoppel effect to prior judicial determinations with respect to the statute of limitations. Delaware courts have noted "that a judgment based on the forum's statute of limitations is not a ruling on the merits and is not, therefore, entitled" to any preclusive effect in a later action in another jurisdiction. *Cappello v. Patrician Towers, Inc.*, 1981 Del. LEXIS 272 (Sup. Ct. of Delaware 1981); *Equity Corporation v. Groves*, 30 Del. Ch. 68, 73, 53 A.2d 505, 507-8 (1947). The statute of limitations merely affects the complainant's remedy in the State in which the suit is brought, and not the right of the matter involved in the action. *See Equity Corporation v. Groves*, 30 Del. Ch. at 73. In fact, the United States Supreme Court recently acknowledged in *Semtek Internat'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), that the expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that a dismissal on such grounds does not have preclusive effect in other jurisdictions with longer unexpired limitation periods.

Similarly, dismissals in Delaware based upon laches are not on the merits. The Court of Chancery in Delaware will give considerable weight to the statute of limitations -- notwithstanding that the statute applies to law actions only -- when passing on the defense of laches. *Fontana v. Julian*, 1979 Del. Ch. LEXIS 388. Where the statute of limitations bars the legal remedy, it shall bar the equitable remedy, unless unusual or extraordinary circumstances render its application inequitable. *Id.* Given the fact that dismissals on the statute of limitations are not on the merits in Delaware, *Cappello v. Patrician Towers*, 1981 Del. LEXIS 272, it follows that dismissals based upon laches where the applicable statute of limitations was considered, are also not on the merits. *See Fontana v. Julian*, 1979 Del. Ch. LEXIS 388.

Although caselaw is sparse, the holdings in *James Julian Inc. v. Dept. of Transportation of the State Delaware*, 1991 Del. Ch. LEXIS 162 and *Ritter v. Ritter*, 1979 Del. Ch. LEXIS 370, suggest that dismissal upon the grounds of laches are not on the merits and have no preclusive effect. In *James Julian*, the Chancery Court stated that it would normally address a defense of laches before considering the merits of the claims, because if the laches defense were valid, the Court would not reach the merits. *James Julian Inc. v. DOT*, 1991 Del. Ch. LEXIS 162. In *Ritter*, the Chancery Court stated that because of its adverse holding on the merits -- an issue involving duress -- it was not necessary to decide whether the action was barred by laches. Clearly, laches is a procedural issue which is given no preclusive effect. *Ritter v. Ritter*, 1979 Del. Ch. LEXIS 370.

The Delaware Court acknowledged that its decision did not constitute a determination on the merits when it founded its decision on the statute of limitations. The Vice-Chancellor specifically stated that he was "putting aside the merits" and dismissing the action solely upon the grounds

that the claims for relief were outside of Delaware's three-year statute of limitations. The judgment on Delaware's statute of limitations was not a ruling on the merits which would have any preclusive effect in a later action in another jurisdiction. *See Cappello v. Patrician Towers*, 1981, Del. LEXIS 272. Accordingly, it necessarily follows that the Delaware judgment does not preclude this subsequent action in this Court in New York where the statute of limitations is six (6) years.

Defendants undermine the legitimacy of their own arguments on this issue when they fail to apply the appropriate legal analysis. (*See* Def. Reply Mem. at 6-8). Ignoring the established legal analysis from the Supreme Court, Second Circuit and this very Court, defendants rely on New York law in order to argue that the Delaware Court's decision should enjoy preclusive effect. I refusing to examine the preclusive effect the decision would enjoy in Delaware, *see Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. at 81 (1984), defendants apply the wrong law and the incorrect legal analysis. Their conclusion is simply in error! As already noted, the appropriate legal review confirms that this Court should not give any preclusive effect to the findings of the Delaware Court.

Defendants' argument further lacks recognition of reality when they suggest that this Court confuse dicta with the Delaware Court's actual holding. Only a previous judgment which the court has "clearly and explicitly set forth . . ." will enjoy preclusive effect and ". . . dicta and implications will not suffice." *Salt Pond Investment Co. v. Wilgus*, 1987 Del. Ch. LEXIS 513 (Del. Chan. Ct. 1987) (citing *Equity Corp. v. Groves*, 53 A.2d 505 (Del. Chan. Ct. 1955)).

Defendants uniquely allege that "[a]ny fair reading" of the Delaware Court's decisions support their opinion that the date of accrual occurred in 1986. (Def. Reply Mem. at 6).

(*See also* Def. Reply Mem. at 5, 7, 8) (proclaiming that the Delaware Court held that the accrual date of the breach of contract was 1986). This argument defies both logic and the express language, *in hac verba*, of the Vice Chancellor. Given defendants' apparent concession that the Delaware Court held that the date of accrual occurred in 1995, (Def. Reply Mem. at 6), the suggestion that, as a matter of preclusive fact, a date of accrual nine years earlier exists makes little sense. More importantly, defendants' attempt to rewrite the court's holding and manufacture a different date of accrual is simply disingenuous. The Delaware Court expressly stated that "[g]iving AmBase all of its due, the claim began to run at least as early as the notice of deficiency by challenging it, it is going to be reduced to a judgment." (Dodyk Aff., Exh. A at 4). (*See also* Exh. A at 6) (noting that the statute of limitations period "clearly . . . began running by 95")). The Delaware Court then qualified that date closer to the present date, when it held that AmBase should have discovered any claim based in contract by December 1996. (*Id.* at Exh. A at 5-6). In its decision on reargument, the Delaware Court reaffirmed its holding that the accrual date occurred in 1996. (*Id.*, Exh. C at 8) (stating that the statute of limitations barred any claim three years after the department of Mr. Mantell in 1996); (*id.*, Exh. C at 17) (expressly stating that "I held that it was clear that AmBase's claims were ripe as of December 1996"). (*See also Id.*, Exh. C at 5-6, 9, 14, 15). In light of the court's statement that it held the date of accrual was set in December 1996, this Court should ignore defendants' efforts to contort the dicta of that decision into a fashionable second holding.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMBASE CORPORATION, a Delaware corporation, Plaintiff, -against- CITY INVESTING COMPANY LIQUIDATING TRUST, as Successor to CITY INVESTING COMPANY, a dissolved Delaware corporation, and GEORGE T. SCHARFFENBERGER, EBEN W. PYNE and LESTER J. MANTELL, Individually and as Trustees of the CITY INVESTING COMPANY LIQUIDATING TRUST, Defendants.	01 Civ. 0771 (LLS)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Introduction

In its most recent brief (its fourth on the subject),[1] AmBase Corporation ("AmBase") misrepresents the City

[1] AmBase's first brief on this subject was filed on November 15, 2000 in opposition to the Trust's motion to dismiss the Delaware action. AmBase again raised the same issues in its motion for reargument in Delaware, filed January 10, 2001. AmBase next raised these issues on March 9, 2001, in its brief in response to the Trust's motion to dismiss this case. AmBase's latest brief was filed on November 26, 2001.

Investing Company Liquidating Trust's (the "Trust") position, the law of Delaware, Vice-Chancellor Strine's opinion, the law of New York, an Administration Agreement which does not even mention AmBase's assumption of the Income Tax Liability, and the Trust's SEC filings. Specifically, AmBase:

(1) confuses the separate doctrines of *res judicata*, which the Trust did not raise, and collateral estoppel, which is applicable to findings of Vice-Chancellor Strine that are dispositive of this case;

(2) confuses the date on which Vice-Chancellor Strine found AmBase's claims accrued (1986) with the inquiry notice date by which any equitable tolling claim by AmBase expired (December 1996);

(3) pretends that section 203(g) of the C.P.L.R. is inapplicable to limit the period within which a party claiming equitable tolling must file its claims;

(4) pretends that an Administration Agreement which says nothing about AmBase's assumption of the Income Tax Liability here at issue is applicable despite the fact that the agreement was originally entered into between AmBase and the now defunct law firm of Finley Kumble, not the Trust, and was terminated long before resolution of the Income Tax Liability;

(5) pretends that the Assignment and Assumption Agreement (the "Assignment Agreement"), pursuant to which AmBase has defended against the Income Tax Liability, is an indemnity agreement;

(6) pretends that the Trust's SEC filings, which state that "<u>other</u> parties are primarily and jointly liable" for the Income Tax Liability do not mean parties "other" than the Trust despite the plain meaning of the word "other".

ARGUMENT

I. THE FACTUAL AND LEGAL FINDINGS OF THE DELAWARE COURT ARE ENTITLED TO PRECLUSIVE EFFECT IN THIS COURT.

The main point of AmBase's latest brief is that Vice-Chancellor Strine's findings are not entitled to preclusive effect under Delaware (and, therefore, New York) law because the Delaware case was dismissed on statute of limitations grounds and not "on the merits". AmBase's argument misstates the Trust's legal position, conflates the two separate and distinct doctrines of *res judicata* (or claim preclusion), and collateral estoppel (or issue preclusion), and misrepresents Delaware law.

The Trust has never raised *res judicata*, or claim preclusion, as a basis for dismissal of this case. Instead, the Trust has consistently maintained that the findings which the Vice Chancellor made in his ruling should be given *issue preclusive* effect.

"Collateral estoppel and *res judicata* are related but distinct doctrines that may bar a party from litigating certain issues or claims in a subsequent proceeding." *Epperson v. Entm't Express, Inc.*, 242 F.3d 100, 108 (2d Cir. 2001). Under the doctrine of *res judicata*, or claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Leather v. Ten Eyck*, 180 F.3d 420, 424 (2d Cir. 1999). In contrast, collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised and decided against that party . . . whether or not the tribunals or causes of action are the same." *Id.* at 425.

Claim preclusion is ordinarily created by a judgment on the merits. However, it is black-letter law that a question of fact actually litigated and resolved in a prior proceeding is entitled to *collateral estoppel* effect--even if the prior case is dismissed on statute of limitations grounds. The Delaware Supreme Court has explicitly recognized the difference between *res judicata* and collateral estoppel, and has given preclusive effect to findings of fact even though the previous court did not adjudicate plaintiff's claims on the merits. *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1073 (Del. 1983); *Winkler v. Balentine*, 254 A.2d 849, 851 (Del. 1969).

AmBase mistakenly claims that the Delaware cases it cites, *Cappello v. Patrician Towers, Inc.*, No. 102, 1981 Del. LEXIS 272 (Del. Jan. 14, 1981) and *Equity Corporation v. Groves*, 53 A.2d 505 (Del. Ch. 1947), stand for the proposition that Delaware courts do not issue preclusive effect to judicial findings of previously litigated facts if the prior case was dismissed on statute of limitations grounds. (AmBase Br. at 17). In fact, the *Cappello* case dealt only with claim preclusion, and not with collateral estoppel. The court in *Cappello* held "that a judgment based on the forum's statute of limitations is not a ruling on the merits and is not, therefore, entitled to *res judicata* effect in a later action in another jurisdiction." *Cappello*, 1981 Del. LEXIS 1980, at *2-3 (emphasis added). By cutting off its quote of the court's opinion to eliminate the words "*res judicata*" and inserting its own phrase: "any preclusive effect", AmBase misrepresents the holding of the case.

In *Cappello*, the plaintiff had previously brought identical claims in Virginia, which were dismissed because they were not brought within Virginia's three-year statute of limitations. The *Cappello* court unsurprisingly held that the prior ruling that the claims were time-barred under Virginia law did not have the *res judicata* effect of determining that those claims were time-barred under Delaware law. The

court made clear, however, that its ruling was only that the Delaware trial court should not have accorded *res judicata* effect "to *that aspect* of the Virginia judgment." *Cappello*, 1981 Del. LEXIS, at *3.

Neither *Cappello* nor *Equity Corp.* in any way suggested that previously-litigated questions of fact or law actually adjudicated by the prior tribunal were not entitled to collateral estoppel effect.

The Trust has never argued that *res judicata* bars AmBase from bringing a claim in New York because that claim was previously dismissed in Delaware on statute of limitations grounds. The Trust's position is only that the Delaware court's factual findings are entitled to issue preclusive effect in this Court. Applying New York law to those previously adjudicated facts requires the dismissal of AmBase's claims because they are time-barred under *New York law*.

Vice Chancellor Strine made at least four findings that are entitled to preclusive effect: (1) AmBase's claims against the Trust accrued in 1986 (Strine Op. 8-9; Strine Oral Op. 4); (2) AmBase was on full inquiry notice of the existence of these claims no later than December 1996 (Strine Op. 14-16; Strine Oral Op. 5); (3) AmBase's alleged reliance on the Trustee defendants in connection with the Income Tax Liability was unreasonable as a matter of law, and could not support equitable tolling of the statute of limitations (Strine Op. 10-14; Strine Oral Op. 4-5); and (4) AmBase's claims are barred by the doctrine of laches (Strine Op. 16-17; Strine Oral Op. 6-7).

New York law clearly grants preclusive effect to factual determinations even when "the issue precluded was the subject of only an alternative determination by the trial court." *Malloy v. Trombley*, 50 N.Y.2d 46, 52, 405 N.E.2d

213, 216 (1980). Seeking to avoid the thrust of theses cases, AmBase makes the untenable claim that *Malloy* does not apply "where the preclusive effect of the prior proceeding is determined pursuant to Delaware law." (AmBase Br. at 23) AmBase's baseless claim that the "alternative determination" doctrine is applicable only where the previous adjudication applied New York law finds no support in principle or precedent. AmBase aiso derides the Trust's "unique and creative application of New York's 'alternative determination' theory to the collateral estoppel doctrine." (AmBase Br. at 22). In fact, the New York doctrine of "alternative determinations" is clearly applicable to collateral estoppel cases. *See Malloy v. Trombley*, 50 N.Y.2d 46, 52, 405 N.E.2d 213, 216 (1980); *Aldrich v. State*, 110 A.D.2d 331, 332, 494 N.Y.S.2d 662, 663 (1985).

Finally, AmBase's counsel have not argued that standards under New York law differ from standards under Delaware law in any way which would undermine Vice-Chancellor Strine's findings, nor could they. Vice-Chancellor Strine's findings that AmBase's claims accrued as early as 1986, that AmBase was on full inquiry notice of its claims not later than December 1996, that AmBase's alleged reliance on the trustees was unreasonable, and that AmBase's claims are barred by laches could have as easily been found by a Justice of the New York State Supreme Court, or this Court.

II. VICE CHANCELLOR STRINE'S CLEAR AND DISTINCT FINDINGS ON BOTH THE ACCRUAL DATE OF THE CAUSE OF ACTION, AND THE DATE BY WHICH AMBASE WAS ON FULL INQUIRY NOTICE, BAR AMBASE'S CLAIMS.

In addition to confusing the law of claim and issue preclusion, AmBase tries to muddy the distinction between Vice-Chancellor Strine's finding as to the accrual date of

AmBase's cause of action, and his finding as to when AmBase had inquiry notice of the alleged breach. Both of these separate findings should be given preclusive effect, and bar AmBase's claims under New York's statute of limitations.

Vice-Chancellor Strine made a clear finding, in both his oral and written opinions, that AmBase's claims against the Trust accrued in 1986, when the IRS issued its Revenue Agent's Report asserting its claims with respect to the Income Tax Liability and when "AmBase had a litigable dispute with the Trust over which entity should have to deal with the IRS" (Strine Op. 8-9):

> I believe in this circumstance if AmBase believed that it was being subjected to liability . . . it could have immediately sued . . . . I think that kind of suit could have been brought in 1986. (Strine Oral Op. 3).
>
> AmBase could have brought this action against the Trust as early as 1986, when the Revenue Report was issued . . . . [A]s AmBase's claims for reimbursement for its expenses back to 1986 demonstrates, AmBase had a litigable dispute with the Trust over which entity should have to deal with the IRS. (Strine Op. 8-9)

Contrary to AmBase's repeated assertions, the Vice Chancellor never held that AmBase's cause of action against the Trust accrued only in 1995 or December 1996. (See AmBase Br. at 10, 11, 14, 21, 23, 24.)

* * *

02-7230

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 00-7230

AMBASE CORPORATION, A Delaware Corporation,

Plaintiff-Appellant,

V.

JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, and MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust,

Defendant-Appellee.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT AMBASE CORPORATION

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* * *

Utilizing New York's six-year statute of limitations period, N.Y. C.P.L.R. § 213, AmBase sought relief under four legal theories: (i) an unjust enrichment restitution or implied contract claim against the Trust and the Trustees; (2) an indemnification claim against the trust and the Trustees; (3) a breach of fiduciary duty claim against Scharffenberger, Pyne and Mantell individually; and (4) a fraudulent conveyance claim against the Trust.[13]

AmBase sought reimbursement from the Trust for any expenses and damages incurred in defending against the potential withholding tax obligation, because the Trust had the responsibility for defending against that claim. JA7-8. Also, because the Tax Court had not yet ruled when AmBase filed suit in New York, AmBase sought a declaratory judgment that the Trust, not AmBase, was primarily liable for any tax eventually owed. *Id.*

On May 23, 2001, the Tax Court rejected the IRS's position and ruled that no withholding tax liability was due. The IRS did not appeal this decision. By this time, however, AmBase had incurred legal expenses and related costs in the amount of approximately $3.2 million in connection with the IRS dispute and had suffered damages from carrying this potential tax liability on its balance sheet.

Following the Tax Court ruling, AmBase sought to add two additional claims against the Trust and the Trustees – a breach of contract claim and a third-party beneficiary

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[13] Under a fifth theory, AmBase pursued a professional negligence and malpractice claim against Mantell. AmBase has since dropped this claim.

claim.[14] During an October 26, 2001 conference in the case, and before the court had even acted on defendants' motion to dismiss, AmBase requested leave to file an amendment to its Complaint. JA949. AmBase had not previously sought leave to amend its Complaint. The District Court stated that it would consider AmBase's request after it had addressed the defendant's motion to dismiss the original Complaint.

The District Court Dismisses AmBase's Complaint. At the outset of this action, the defendants moved under FED. R. Civ. P. 12(b)(6) to dismiss AmBase's Complaint on statute of limitations grounds, arguing, in large measure, that the District Court should give preclusive effect to the decision of the Delaware Court regarding the Delaware statute of limitations. The motion to dismiss was never converted to a summary judgment motion. On January 11, 2002, the District Court dismissed AmBase's complaint without providing AmBase the opportunity to replead it had requested on several occasions. SA1.

As an initial matter, Judge Stanton rejected defendants' claim that the Delaware Court's decision under Delaware law had any preclusive effect in this proceeding, noting that New York's longer limitations period, which governed in this proceeding, required the court to determine the date of accrual of AmBase's claims under New York law. SA6-7. As the U.S. Supreme Court recently reiterated: "[T]he traditional rule is that expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with

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[14] Pursuant to Judge Stanton's standing rules, AmBase was required first to seek the court's permission to file a motion to amend. Ultimately, the court denied AmBase permission even to file its motion to amend. SA18.

longer, unexpired limitations periods." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U. S. 497, 504 (2001) (citations omitted).

However, the court then held that all of AmBase's claims against the defendants accrued in March 1986 when the IRS agent issued his report following completion of his audit relating to City Finance. According to Judge Stanton, the agent's report asserted that "AmBase, as agent for City Investing, owed" withholding taxes. In fact, however, at the time the court ruled, a copy of the revenue agent's report was not even before the court since it was not appended to the complaint and could not, therefore, be considered on a motion to dismiss. In any event, the court's characterization of that report is simply not true. Nonetheless, the court held that the six-year limitations period on AmBase's unjust enrichment, restitution and implied contract claim as well as its breach of fiduciary duty claims against the individual defendants all began to run as of the 1986 date, and thus expired long before AmBase brought this action. SA8. As to AmBase's indemnification claim, the court concluded that as a matter of law AmBase had "no basis for a contractual claim of indemnity." SA12.

* * *

According to the Court, these claims, like all the others were time-barred because the six-year statute of limitations for those claims began to run in March 1986 upon issuance of the Agent's Report, and therefore expired in 1992, years before the IRS had even issued its statutory Notice of Deficiency. The District Court abused its discretion in refusing these amendments because under New York's continuing breach doctrine, AmBase is entitled to seek recovery under these contractual claims for any breaches that occurred and any damages it sustained within six years of the filing of the Complaint. It is certainly inappropriate at this early stage of the proceedings to decide as a matter of law

that AmBase will be unable under any set of facts to establish continuing duties on the part of the Trust and its Trustees as well as continuing breaches by those defendants.

Once again, the District Court applied the wrong accrual date - 1986 - and ignored governing New York case law. Applying the six-year statute of limitations period for contract claims, see N.Y. C.P.L.R. § 213(2), the District Court concluded that AmBase's proposed contract-based claims accrued as of March 1986 and expired as of 1992. In reaching that conclusion, the District Court relied primarily on the New York State Court of Appeals' decision in *Ely-Cruikshank Co. v. Bank of Montreal*, 599 N.Y.S.2d 501 (1993), which recites the general rule that the statute of limitations on a contract claim begins to run at the time of breach or when one party omits the performance of a contractual obligation.

However, that general rule is subject to an important exception that the court in *Ely-Cruikshank* itself recognized but the District Court ignored. *See ElyCruikshank*, 599 N.Y.S.2d at 503 (noting that contracts involving obligations that extend over a period of years "warrant different considerations and results under the Statute of Limitations' microscope.") (citation and internal quotation marks omitted). *"'Where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to [the length of the limitations period] prior to the filing of the suit.'"* *Lennon v. Seaman*, 63 F. Supp 2d. 428, 446 (S.D.N.Y. 1999) (quoting *Airco Alloys Div., Airco, Inc. v. Niagara Mohawk Power Corp.*, 430 N.Y.S.2d 179, 186 (4th Dep't 1980) (citations omitted, emphasis added); *see Bulova Watch Co v. Celotex Corp.*, 415 N.Y.S.2d 817, 820 (1979); *see also Cent. Gen. Hosp. v. Bramex Ltd.*, 570 N.Y.S.2d 670, 670-71 (2nd Dep't 1991); *Franza's Universal*

Scrap Metal, Inc. v. Town of Islip, 453 N.Y.S.2d 24 (2nd Dep't 1982).

The concept of a duty (or its breach) arising every time a particular transaction or act occurs is a common principle of statute of limitations law. Indeed, it is evident in the unjust enrichment case law just discussed. The underlying rationale for this rule of contract law - known as the continuing breach rule — is that courts should neither too quickly nor too narrowly define the concept of breach. As New York's highest court has noted in another context:

> If a creditor's action against a guarantor accrues wholly and immediately at the point of the first default in payment - the six-year limitations period for any action against the guarantor clocking in at that point - then creditors would be left with no alternative or incentive but to accelerate the entire debt or risk losing all opportunity to pursue the guaranty. The prudent commercial practice rule would keep in place incentives to the creditor to proceed with some flexibility in working with the debtor based on stipulated contractual provisions. In that dynamic, for example, parties might be able to continue to work toward amicable and fair resolutions between themselves rather than immediately drawing litigation swords and marching off to a courthouse.

Phoenix Acquisition Corp. v. Campcore, Inc., 596 N.Y.S.2d 752, 755 (1993).

Therefore, if, as alleged in this case, "a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to the filing of the suit." *Airco Alloys*, 430 N.Y.S.2d at 186' *cf. Sporn v. MCA*

Records, Inc., 462 N.Y.S.2d 413, 415 (1983) ("If defendant hits plaintiff's horse repeatedly, plaintiff has a new cause of action upon each striking...") (internal quotation marks omitted). By ignoring the rules that govern claims of a continuing breach in New York, the District Court applied the wrong legal standard in evaluating AmBase's proposed claims.

Whether a party has a continuing obligation under a contract depends upon the nature of the party's obligation and whether it extends over a period of time. The Court of Appeals' decision in Bulova Watch is instructive. There, Judge Fuchsberg, writing for the court, held that a company's promise to keep a roof in good repair for a twenty-year period constituted a continuing obligation. Therefore, each time the roof leaked and the roofing company failed to repair it, the roofing company committed a separate breach and the six-year limitations period ran from the date of each one of those breaches. See Bulova Watch, 415 N.Y.S.2d at 820 (the six-year limitations period ran "separately for the damages occasioned each time a breach of the obligation to repair the bonded roof occurred"); see also, Bramex, 570 N.Y.S.2d at 671 ("... the applicable limitations period is to be measured from the last date upon which the continuing duty was breached"); Franza's Universal Scrap Metal, 453 N.Y.S.2d at 25 ("[T]he wrong complained of here is a continuing one and gives rise to the accrual of successive causes of action for each day's breach of the town's duties under the contract").

Under the Trust Agreement and the Assignment Agreement - each of which continue in effect to this very day since the Trust remains in existence - the Trust and its Trustees had a continuing obligation to pay for the ongoing costs of defending against the withholding tax claim and, if necessary, to pay any tax due. AmBase's proposed contract claims are based on the failure of the Trust and the Trustees

to fulfill their continuing obligations under those agreements to take responsibility for the alleged withholding tax liability and to pay for the continuing costs of defending against the IRS's Notice of Deficiency. As such, the defendants did not commit a single, isolated breach in 1986 when they did not pay the first expense incurred after issuance of the Agent's Report to City. Instead, they committed a continuing series of breaches that extended through 2001. AmBase, therefore, should have been allowed to seek to recover "claims for damages occurring up to six years prior to the filing of the suit." *Airco Alloys*, 430 N.Y.S.2d at 186; *see Bulova Watch*, 415 N.Y.S.2d at 820.[22]

Finally, and in any event, to the extent that there were any question whether the defendants' duties under the Trust and Assignment Agreements were continuing or not, that issue should not have been decided as a matter of law at this preliminary stage of the litigation, as numerous cases in state and federal court have made clear. Thus, in *Airco Alloys*, the appellate court rejected an invitation to determine the applicability of the continuing breach doctrine at the summary judgment stage, much less resolve it at the motion to dismiss stage. *See* 430 N.Y.S.2d at 186. The court rightly held that "[i]n as much as an issue of fact exists with respect to [defendant's] obligations under [the contract], it is not yet possible to determine the issue of accrual of alleged breaches of the contract and, where a triable issue of fact exists with respect to accrual of a claim, such issue should not be determined on motion." *Id.; accord Lennon*, 63 F. Supp 2d. at 446.

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[22] *See* FED. R. CIV. P. 15(c) ("An amendment of a pleading relates back to the date original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted set forth in the original pleading . . . .").

The obligations of the Trust and the Trustees under the Assignment Agreement and the Trust Agreement did not end in 1986; nor did their breaches end in 1986. So long as the Trust continued in existence, it had a continuing obligation under those agreements to perform its duties - that is, assume responsibility for the alleged withholding liability and to pay for the ongoing costs of defending against the IRS Notice of Deficiency, costs that continued to be incurred into 2001. Thus, the District Court's decision denying AmBase leave to amend its Complaint and dismissing its proposed contract claims as futile should be reversed, and AmBase should be permitted to amend its Complaint to assert these proposed claims.

III. AmBase's Claims Against Scharffenberger and Pyne Are Timely

Like Mantell, Scharffenberger and Pyne, were sued in their individual capacities, as well as in their capacities as Trustees. Scharffenberger served as Chairman of AmBase's Board of Directors for several years as well as its CEO. Pyne served as Vice-Chairman of AmBase's Board of Directors. Both owed a fiduciary duty to AmBase, but, nevertheless, foisted responsibility for the withholding tax liability onto AmBase instead of the Trust in furtherance of their economic interests.

The District Court dismissed AmBase's claims against Scharffenberger and Pyne in their individual capacities as untimely, holding that the six-year statute of limitations period for AmBase's breach of fiduciary duty claims against these individuals expired in 1992, even before their fiduciary relationships with AmBase ended. Once again, the District Court applied the wrong legal standard and in any event acted prematurely.

First, under the doctrine of continuous representation discussed above, *see supra* at 31-35, the six-year limitations period for the breach of fiduciary duty claims against Scharffenberger, Pyne and Mantell did not begin to run until their collective fiduciary relationships with AmBase ended. *See Golden Pacific*, 273 F.3d at 519. While Scharffenberger and Pyne each left AmBase in 1993, Mantell did not leave until December 1996. The complaint alleges that at all relevant times Scharffenberger and Pyne were acting in concert with their fellow fiduciary and Trustee Mantell. As AmBase alleged, the three worked together, not alone, in misleading AmBase about the withholding tax obligation and in misinforming subsequent management about the Trust's liability for that obligation. *See* JA15. Therefore, it was only in 1996, after the last of the three collaborators left AmBase, that it was in a position to institute suit against its former fiduciaries.

AmBase acknowledges it has not discovered any New York decision applying the continuing relationship doctrine in the context of fiduciaries who are alleged to have collaborated in the fashion that AmBase asserts Scharffenberger, Pyne and Mantell did. However, the principles underlying the continuing relationship doctrine support its use in this case. As this Court observed in *Golden Pacific*, the reason for this doctrine "is that the beneficiary should be entitled to rely upon a fiduciary's skill without the necessity of interrupting a continuous relationship of trust and confidence by instituting suit." 273 F.3d at 519 (citing *Greene*, 451 N.Y.S.2d at 51). Under that rationale, AmBase should not have been require to interrupt "a continuous relationship of trust" and sue its three former fiduciaries who were acting in concert to the detriment of AmBase until the last of the fiduciaries had terminated his relationship with AmBase. In short, the relationship between the parties - that is, AmBase (on the one hand) and Mantell, Scharffenberger and, collectively (on the other) - did not terminate until 1996.

At a minimum, at this stage of the litigation, AmBase's allegations of concerted action and collective breaches of fiduciary duty should have been sufficient to allow AmBase to proceed forward with its claims against Scharffenberger and Pyne pending further development of the facts. *See, e.g., McCall*, 232 F.3d at 32-33 (requiring all facts to be construed in plaintiff's favor); *cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 337-38 (1971).

Second, under New York's common law doctrine of equitable estoppel, "[a] defendant may be estopped from pleading the Statute of Limitations where a plaintiff was induced by fraud, misrepresentation, or deception to refrain from timely commencing an action." *Gleason v. Spota*, 599 N.Y.S.2d 297, 298-99 (2nd Dep't 1993) (citing, *inter alia*, *Simcuski v. Saeli*, 406 N.Y.S.2d 259, 262 (1978)). The doctrine is applied so "that a wrongdoer should not be able to take refuge behind the shield of his own wrong." *Gen. Stencils, Inc. v. Chiappa*, 272 N.Y.S.2d 337, 339 (1966). As this Court recently held in *Farkas v. Farkas*, 168 F.3d 638, 642 (2d Cir. 1999), to plead equitable estoppel, it is not necessary to allege that the defendant "actively thwarted" plaintiff's attempts to file a claim. Equitable estoppel can even be invoked when a lengthy period of time has elapsed between the time when a claim would ordinarily accrue and when the plaintiff alleges that it became aware of the claim. *See Will of Spewack*, 610 N.Y.S.2d 243, 245 (1st 1994) (failure to discover claim for 30 years after theft does not preclude use of equitable estoppel).

AmBase pleaded sufficient facts to enable it to avail itself of the equitable estoppel doctrine. *See Simcuski*, 406 N.Y.S.2d at 262.[23] Nonetheless, the District Court concluded

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[23] AmBase expressly alleged in its Complaint both that Scharffenberger and Pyne - as well as Mantell - misrepresented the nature

that AmBase should have discovered its claims against Scharffenberger and Pyne in 1996 when Mantell left.

* * *

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of the withholding tax obligation and that AmBase relied on the representations of these defendants in incurring the costs and expenses of defending against the withholding tax claim and in not bringing this lawsuit sooner. JA15. Moreover, the Complaint alleges that "[a]s they left the senior management of AmBase, each of the Individual Defendants perpetuated the misrepresentation that the alleged withholding tax liability was an AmBase obligation by advising subsequent management of AmBase that such alleged withholding tax liability was in fact the primary obligation of AmBase."

(3)

No. 03-394

Supreme Court, U.S.
FILED
OCT 27 2003
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In The Supreme Court of the United States

AMBASE CORPORATION,
A Delaware Corporation,

Petitioner,

v.

CITY INVESTING COMPANY LIQUIDATING TRUST, as successor to City Investing Company, a dissolved Delaware Corporation, JOHN J. QUIRK, Trustee of City Investing Company Liquidating Trust, MARION SCHARFFENBERGER, Executrix of the Estate of George T. Scharffenberger, EBEN W. PYNE, Individually and as Trustee of the City Investing Company Liquidating Trust, and LESTER J. MANTELL, Individually and as Trustee of the City Investing Company Liquidating Trust,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. City's Opposition ("Opp.") does not contest that AmBase has identified a circuit split over an issue that is worthy of this Court's review – namely, whether a court of appeals may sua sponte raise and apply a defense of res judicata that was never raised in either the district court or on appeal. Nor does City contest that the Second Circuit did in fact act sua sponte to raise and apply the defense of res judicata, even though City never raised that defense before the district court or at any time on appeal. Indeed, it bears emphasizing that the parties agree (and there can be no dispute in light of the decision itself) that the ground for the Second Circuit's decision – that the Delaware statute of limitations' dismissal had *claim* preclusive effect on the New York action – had absolutely nothing to do with the entirely distinct defense of collateral estoppel, or *issue* preclusion. Thus, while City raised the defense of issue preclusion before the trial court, it does not deny that it never raised the defense of claim preclusion (or res judicata), nor does it deny that the Second Circuit based its decision *solely* upon that never-raised defense.

Nevertheless, while effectively conceding the existence of a circuit split that warrants review by this Court, City argues that the Second Circuit's decision does not fit within that split because, City claims, its right to invoke res judicata at a later stage in the proceedings was never actually waived: City argues both that it did not expressly disclaim the defense, and that it was never required to affirmatively raise the defense because it never filed an answer. Opp. 15-21. The unambiguous record easily defeats both arguments (*see infra*). Furthermore, because there is no dispute that the Second Circuit raised and applied the affirmative defense of res judicata that was never once raised by the defendant, either at trial or on appeal, there likewise can be no doubt that its decision

squarely presents this Court with the federal procedural and constitutional issues created by the circuit split outlined in the Petition for Writ of Certiorari ("Pet.") 8-22.

a. City accuses AmBase of presenting "a misleading distortion of the record," because "[c]ontrary to AmBase's posturing before this Court, AmBase was fully aware throughout the litigation that City Trust sought to rely on whatever preclusive effect the Trust could secure from Chancellor Strine's opinion." Opp. 19. While it does not deny having twice explicitly represented to the District Court that it "has *never* raised *res judicata*, or claim preclusion, as a basis for dismissal of this case," Pet. 7 (quoting Appendix to the Petition for a Writ of Certiorari ("App.") 61a) (emphasis added); *see also* App. 63a, it argues that this disclaimer was given only in the "limited context" of advancing its collateral estoppel, or "issue preclusion" defense. Opp. 20. But that "limited context" is precisely what proves the point beyond all doubt: City could not have been more emphatic, or more unequivocal, in its insistence that the defense of issue preclusion (collateral estoppel) and claim preclusion (res judicata) are totally "distinct," and that it was *only* advancing the former, not the latter.

The record could not be clearer. City's motion to dismiss AmBase's New York Complaint argued that the Delaware Court indicated that AmBase could have brought the action as early as 1986, and that therefore the New York court was bound by the doctrine of collateral estoppel to accept that as a finding. Appendix to Respondents' Brief in Opposition to Petition for a Writ of Certiorari ("Resp. App.") A-10. In response, AmBase argued that the Delaware court did not "necessarily decide" anything at all with respect to 1986, but instead based its decision solely on the ground that AmBase was on inquiry notice "no later than December 1996." Resp. App. A-24 – A-27; App. 50a. While December 1996 was outside of Delaware's *three*-year statute of limitations, it was not outside New York's *six*-year

statute of limitations, since the New York complaint was filed in January of 2001. Thus, the Delaware dismissal had no issue preclusive effect on the New York action, – as the district court later held, "Chancellor Strine did not fix the exact date when the claims accrued." App. 29a.

In a subsequent round of briefing, AmBase once again explained that issue preclusion could not possibly apply, but also explained, for good measure and even though the issue was not raised, that *claim* preclusion also could not apply, since the Delaware dismissal on statute of limitations' grounds was clearly *not* a decision "on the merits." Resp. App. A-29 – A-31. As both parties agree, the defense of claim preclusion requires there to have been a dismissal "on the merits," whereas the "distinct" defense of "issue preclusion" does not. *See* Resp. App. A-36 – A-37. Thus, by emphasizing that the Delaware dismissal was clearly *not* a dismissal "on the merits," AmBase directly confronted City with the reason why the law prevented it from ever even insinuating that the Delaware decision supported a claim preclusion (or res judicata) defense.

In response to this direct confrontation, City simply abdicated: it did not contend or suggest that the Delaware statute of limitations dismissal might somehow constitute a decision "on the merits," and it did not contend or even suggest that the Delaware decision might possibly give rise to a res judicata defense. Nor did it even reserve the issue for future argument. Rather, it emphatically demurred, arguing that AmBase had "confuse[d] the separate doctrines of *res judicata*, which the Trust did not raise, and collateral estoppel, which is applicable to the findings of Vice-Chancellor Strine." Resp. App. A-35. Lest there be any confusion, repeatedly throughout its brief City insisted that it was *not* raising the res judicata defense:

> The Trust has never argued that *res judicata* bars AmBase from bringing a claim in New York because the claim was previously dismissed in

> Delaware on statute of limitations grounds. *The Trust's position is only that the Delaware court's factual findings are entitled to issue preclusive effect in this Court.*

Resp. App. A-38 (emphasis added).

Moreover, in response to AmBase's argument that, under Delaware law, a dismissal on statute of limitations grounds is *not* a dismissal "on the merits," City all but explicitly conceded the point:

> Claim preclusion is ordinarily created by a judgment on the merits. However, it is black-letter law that a question of fact actually litigated and resolved in a prior proceeding is entitled to *collateral estoppel* effect – *even if the prior case is dismissed on statute of limitations grounds.* The Delaware Supreme Court has explicitly recognized the difference between *res judicata* and collateral estoppel, and has given preclusive effect to findings of fact even though the previous court did not adjudicate plaintiff's claims on the merits.

Resp. App. A-37 (citations omitted) (second emphasis added). Likewise, City acknowledged the Delaware cases holding that a statute of limitations' dismissal in one jurisdiction is not res judicata in another jurisdiction, and even described that rule of law – which directly undermines its ultimate victory in the Second Circuit – as "unsurprising[ ]." Resp. App. A-37 (addressing *Cappello v. Patrician Towers, Inc.*, No. 102, 1981 Del. LEXIS 272 (Del. Jan. 14, 1981) and *Equity Corp. v. Groves*, 53 A.2d 505 (Del. Ch. 1947)). As explained in the Petition, these "unsurprising" cases are the very ones that AmBase was unable to present to the Second Circuit before it rendered its very "surprising" res judicata decision, and which would almost necessarily have demonstrated to the panel why res judicata was inapplicable. After all, City's only answer to these cases was to insist that they were inapposite because it "has never raised *res judicata*, or claim

preclusion, as a basis for dismissal of this case." Resp. App. A-36.

Thus, when confronted with the argument and the authorities that directly defeat the res judicata defense on which it ultimately prevailed in the Second Circuit – the very same arguments and authorities that AmBase was denied the opportunity to present to the Second Circuit – City's only answer was to insist that it was not advancing a res judicata defense, but was instead only arguing collateral estoppel. If that is not an express waiver of an affirmative defense, it is hard to imagine what could be.

b. City also argues that it cannot have waived the affirmative defense of res judicata because it has yet to file an answer in this case. Opp. 15-18. Because FED. R. CIV. P. 8(c) "applies only to 'pleadings,'" and because Rule 12 motions to dismiss are not included in the definition of "pleadings," City maintains that it was never obligated to raise res judicata, and therefore cannot be deemed to have waived that defense. Opp. 15.

This technical argument completely overlooks the fact that, as explained above, City expressly disclaimed the res judicata defense before the District Court. Moreover, this express disclaimer was given in the context of a second round of briefing, after the briefing on the initial motion to dismiss, and after the trial judge had explicitly permitted the parties to refer to matters outside the four corners of the brief, practically converting the briefing into a summary judgment motion. *See* Joint Appendix in *AmBase Corp. v. City Investing Liquidating Trust*, No. 02-7230 (2d Cir. filed June 3, 2002) 434-847 (attachments to briefing before District Court). There can be no doubt that this express disclaimer constituted an "intentional relinquishment or abandonment of a known right," and therefore constituted a clear waiver of the defense. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Tueros v. Greiner*, 343 F.3d 587, No. 02-2119, 2003 U.S. App. LEXIS 18936, at *14 (2d Cir. Sept. 12, 2003) (because argument was "expressly

disclaimed" it was held "to have been abandoned"); *Conboy v. AT&T*, 241 F.3d 242, 254 (2d Cir. 2001) (claims not surfaced in motion to dismiss briefing held to be waived). This express *waiver* obviates the question whether City also *forfeited* the res judicata defense simply by failure to raise it. *See, e.g., Freytag v. Commissioner, IRS*, 501 U.S. 868, 894 n.2 (1991) (explaining difference between waiver, which is an "'intentional relinquishment,'" and forfeiture, which can be accomplished "by means short of waiver") (Scalia, J., concurring) (quoting *Johnson*, 304 U.S. at 364); *United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture."). Furthermore, that City disclaimed res judicata in a self-serving effort to avoid the arguments that defeat the defense makes it especially important to treat its express disclaimer as a final waiver of its right to raise res judicata. *Cf. Brown v. United States*, 356 U.S. 148 (1958) (holding that when defendant took stand in own defense, she waived right of self defense); *Freytag*, 501 U.S. at 894-95 (discussing dangers of "sandbagging" caused by failing to enforce waiver rule).

The case law City cites holds merely that defendants who have *not* disclaimed their right to an affirmative defense may raise it in an answer filed subsequent to the denial of a pre-answer motion to dismiss. Opp. at 17-18. None of these authorities speak to the situation where, in the course of briefing the motion to dismiss based upon a closely related affirmative defense, the defendant expressly disclaimed any reliance upon the defense in question. In that situation, it cannot be that Rule 8(c) *saves* an otherwise expressly disclaimed defense. To the contrary, even where defendants have technically complied with the Rule 8(c) requirement of raising an affirmative defense in their answer, if the defendant's *conduct* has evidenced a waiver of that defense, the defendant will be held to that waiver. *See, e.g., Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000), *cert. denied*, 532 U.S. 1020 (2001) (affirmative defense set forth in answer waived through failure to

raise it in subsequent proceedings despite ample opportunity to do so).

More generally, "Rule 8(c) is designed to provide plaintiffs with adequate notice of a defendant's intention to litigate an affirmative defense, thereby affording an opportunity to develop any evidence and offer responsive arguments relating to the defense." *Davignon v. Clemney*, 322 F.3d 1, 15 (1st Cir. 2003); *see also Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 350 (1971). Most circuits have concluded that these principles would be violated if an appellate court were to raise an affirmative defense on appeal sua sponte, when the defendant itself had never raised it. *See* Pet. 25 n.13. Other circuits, however, have split from this authority, and have held that it is permissible to raise such a defense sua sponte, though these courts differ as to whether or not the opposing party must at least be given notice and opportunity to rebut the argument. *See* Pet. 10-14. By surprising AmBase with an affirmance based solely upon a never-argued and expressly-disclaimed res judicata defense, the Second Circuit aligned itself with the most extreme of these latter authorities, taking the view that it may apply res judicata without even giving the plaintiff notice and opportunity to address it. Especially since it did so in the face of City's express disclaimer of the defense, and especially since that disclaimer was given because City effectively recognized the dispositive legal obstacle to raising the defense, the Second Circuit's decision presents the foregoing circuit split in a context that manifests all of the problems related to such sua sponte action, and that is therefore worthy of certiorari.[1]

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[1] At an absolute minimum, City's disclaimer made it impossible for it to raise res judicata on appeal, *see generally Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal

(Continued on following page)

2. The clearest sign that City has absolutely no answer to the Petition is the fact that it devotes over two pages of its Statement and almost half of its Argument to the proposition that AmBase should have been dismissed under a New York statute *that City never even bothered to cite in the courts below*. *See* Opp. 8-10, 11, 14-15, 21-22, 26. There, City consistently argued that *New York*'s statute of limitations applied to AmBase's New York action, and never once cited to the New York "borrowing statute," N.Y. CIVIL PRACTICE LAW & RULES ("CPLR") § 202, nor argued that it required the application of *Delaware*'s limitations period. *See* Resp. A-8 – A-19 (arguing that New York statutes of limitation applied to AmBase's complaint). Now, without a hint of irony, City argues that this Court should ignore AmBase's claim that its rights were violated by a dismissal based upon an argument that it never had an opportunity to address and that was plainly wrong as a matter of law, because there is *another* argument that AmBase has never had a chance to address that – if left unaddressed – could also be used as a basis for a (plainly erroneous) dismissal. Indeed, City even has the gall to express outrage that AmBase did not address CPLR § 202 in its Petition – normally, however, it is not necessary to address statutes that one's opponent has seen fit not to cite in *any* of its trial or appellate briefs, and that neither the trial nor appellate court cared to cite. As confirmed by City's consistent decision not to raise it before now, CPLR § 202 does not require application of Delaware's statute of limitations: given that the contract between City and AmBase that is at issue expressly stipulated that all disputes would be governed by New York law, that City's principal place of business is in New York, and that the

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appellate court does not consider an issue not passed upon below."), so that the Second Circuit's sua sponte raising of the defense presents the circuit split even if the defense was not technically waived.

actions giving rise to AmBase's claims occurred in New York, the claims advanced by AmBase's Complaint undoubtedly accrued in New York.

3. City makes essentially no effort to contest that by giving a Delaware statute of limitations' dismissal res judicata effect in New York, the Second Circuit erred, and contradicted what this Court has called the "traditional rule . . . that dismissal on that ground does not have claim-preclusive effect in other jurisdictions with longer, unexpired limitation periods." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001). Instead, City argues that this error was purely a misinterpretation of state law, and hence of no interest to this Court. Opp. 22-26. That is not correct. First, this Court has made clear that "it is for federal law, not state law, to prescribe the measure of credit which one state shall give to another's judgment," and that an abdication of such federal law oversight "risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause . . . to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 271 n.15, 272 (1980). Moreover, this Court has held that the Full Faith and Credit Act, 28 U.S.C. § 1738 – which is, after all, a federal statute – mandates that "a federal court is not free to accord greater preclusive effect to a state court judgment than the state courts themselves would give to it." *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985) (Burger, C.J., concurring) (citation omitted). *See also* Pet. 23 n.9 & 25 n.13.

Second, City ignores AmBase's point, Pet. 25 n.13, that the Second Circuit's decision abandons a long tradition in New York courts holding that "[a] dismissal on statute of limitations grounds by another state would not, by itself, bar the bringing of an action *in this state* on res judicata grounds." *SafeCard Servs., Inc. v. American Express Travel Related Servs. Co.*, 203 A.D.2d 65, 66 (N.Y. App. Div. 1994) (emphasis added); *see also Warner v.*

Buffalo Drydock Co., 67 F.2d 540 (2d Cir. 1933), *cert. denied*, 291 U.S. 678 (1934) ("The decisions of the Supreme Court and the English cases all indicate that the judgment of the court of a foreign state which dismisses a cause of action because of the statute of limitations of the forum is not a decision upon the merits and is not a bar to a new action upon the identical claim in the courts of another state."). By eviscerating this "traditional rule" of the New York state courts, the Second Circuit's decision contradicts the federal law principles set forth in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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